No. 16222 VOL. 3099

United States
Court of Appeals
for the Ninth Circuit

H. GREENWAY ALBERT and MAJA GREENWAY ALBERT,

Appellants,

vs.

IRA B. JORALEMON,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Arizona

FILED
FEB 19 1959
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif. — 2-26-59

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

ATTORNEYS OF RECORD

McCARTY, CHANDLER & UDALL,
270 North Church Avenue,
Tucson, Arizona;

GATEWOOD & GREENWAY,
199 North Stone Avenue,
Tucson, Arizona,

Attorneys for Appellants.

RALPH W. BILBY,
WILBERT E. DOLPH, JR.,
BOYLE, BILBY, THOMPSON & SHOENHAIR,
Ninth Floor, Valley National Building,
Tucson, Arizona,

Attorneys for Appellee.

In the District Court of the United States
for the District of Arizona

No. Civ. 964—Tucson

IRA B. JORALEMON,

Plaintiff,

vs.

H. GREENWAY ALBERT and MAJA GREENWAY ALBERT, Husband and Wife,

Defendants.

COMPLAINT

Comes Now plaintiff and for his claim against defendants alleges:

1. Plaintiff is a resident and citizen of San Francisco, California and defendants and each of them are residents and citizens of Tombstone, Arizona. The amount in controversy between plaintiff and defendants exceeds the sum of $3,000 exclusive of costs and interest.

2. The plaintiff as lessee and optionee and the defendants as lessors and optionors did, during the month of September, 1956, enter into a lease and option to purchase agreement, the effective date of which was June 1, 1956, providing for the lease and option to purchase certain unpatented mining claims located in the County of Pima, State of Arizona, and known as Cornelia Extension A, B, C and D, and Cornelia Nos. 1 through 35, inclusive.

3. Said lease and option to purchase agreement contains the following provisions:

"8. In consideration for the lease hereunder, the lessee shall pay to the lessors the following amounts:

"(A) The sum of Two Thousand Dollars ($2,000.00) heretofore paid and receipt of which amount is hereby acknowledged by Lessors.

"(B) The sum of One Thousand Dollars ($1,000.00) each month for fourteen (14) additional months commencing on the date Lessors secure the quitclaim deeds or quiet title judgment satisfactory to Lessee as referred to above.

"(C) The sum of Seven Thousand Dollars ($7,000.00) on or before November 8, 1956.

"(D) Three additional payments of Seven Thousand Dollars ($7,000.00) each shall be made three (3), six (6), and nine (9) months, respectively, after the date upon which the payment referred to in subparagraph (C) shall be due."

"7. The parties hereto recognize that there are certain title defects in the claims described, and Lessee desires that Lessors clear their title to said mining claims against the Uranium Corporation of America and Mr. and Mrs. John H. White, Jr., either by securing quitclaim deeds from them or quieting title. Such quitclaim deeds or ultimate judgment in a court action shall be in a form satisfactory to Lessee. If said title defects are not cleared in a manner satisfactory to Lessee within a period of two years from the date hereof, then all rights

between the parties hereto under this agreement shall be terminated. Any legal expense incident to the foregoing paid by Lessee shall be deducted from future payments to Lessors, pro rated over one year's payments as they become due."

"3. Notwithstanding the provisions of paragraph (2) hereof, the lessee may at any time after payment of the first quarterly payment of Seven Thousand Dollars as hereinafter set forth, surrender this lease by giving notice in writing thereof to the lessors, accompanied by an executed and acknowledged quitclaim deed extinguishing all rights of the lessee hereunder and relinquishing to the lessors the demised properties. Upon delivery of such notice and deed and the relinquishment of all the demised properties, all rights and obligations of the parties hereto not then accrued shall cease and terminate. The Lessee agrees to do the necessary assessment work from year to year unless he has withdrawn from this agreement, and provided that such withdrawal shall not be dated between April 1st and July 1st of any year unless the assessment work for that year has been completed. Any notice of withdrawal shall be sent by registered or certified mail to the lessors at Tombstone, Arizona."

"13. * * * It shall be further agreed that said lease may be terminated at any time by the Lessee as to all or any portion thereof by giving the Lessors written notice of such intention, and that upon termination or surrender the Lessee will, upon the request by the Lessors, execute and record in the

appropriate public office a formal release and discharge evidencing such termination, provided that payments hereunder shall continue as provided hereunder until the lease shall have been terminated as to all of the demised properties."

"14. * * * It shall be agreed, however, that any default claimed and noticed against Lessee as respects the payment of money can be cured by the deposit in escrow in a reputable bank or trust company of the amount in controversy, subject to notice of such deposit to Lessors, and to remain in escrow until decision by court or arbitrators as the parties may elect."

4. Thereafter, plaintiff caused a quiet title action to be instituted in accordance with the provisions of paragraph 7 of said lease and option to purchase as quoted above. Plaintiff incurred attorney's fees and costs totaling $601.77 in connection with said quiet title action and in December of 1956, obtained a settlement of said action by the payment of $4,000 from the plaintiff herein to the defendants in said action to quiet title, in exchange for quitclaim deeds from said defendants. The institution of the aforesaid quiet title action, the incurring of the aforesaid attorney's fees and costs and the payment of the $4,000 in settlement of said action were all done with the consent and approval of the defendants in this action.

5. Prior to November 5, 1956, plaintiff had paid to defendants all sums required by said lease and

option to be paid; subsequent to November 5, 1956, plaintiff paid to defendants the sum of $6,218.67.

6. On November 5, 1956, plaintiff mailed to defendants a letter, copy of which is annexed hereto as Exhibit A, by depositing the same in the United States Mail, duly registered or certified, with postage thereon prepaid, addressed to H. Greenway Albert, Tombstone, Arizona; the statements contained in Exhibit A are incorporated herein.

7. The plaintiff, in reliance upon said letter annexed hereto as Exhibit A as a termination of said lease and option to purchase agreement en toto, abandoned the premises in less than 90 days from the date of said letter, and took no further steps toward the termination of said agreement.

8. Thereafter, the defendants failed to advise plaintiff that they did not accept said letter annexed hereto as Exhibit A as a termination, failed to make any demands for a quitclaim deed or a further release from plaintiff, and failed to indicate to plaintiff in any manner whatsoever that they took the position that the lease and option to purchase agreement was still in effect until a letter from defendants' attorneys dated April 16, 1957, was mailed to plaintiff, a copy of which said letter is annexed hereto as Exhibit B. Defendants presently assert that the payments provided for under said lease and option have continued to accrue and that they will in the future continue to accrue until and unless plaintiff has actually paid to defendants the amounts as-

serted by defendants to be due up through the date of such payment.

9. If defendants had advised plaintiff subsequent to the receipt by defendants of the letter annexed hereto as Exhibit A, before any other payments had accrued under the terms of said lease and option, that they took the position that said letter did not terminate the lease and option to purchase agreement, plaintiff would have immediately executed and served upon defendants another notice of termination of said lease and option to purchase agreement in a form to satisfy defendants' objections; plaintiff stood ready, willing and able at all times subsequent to his letter to defendants annexed hereto as Exhibit A to furnish defendants with a quitclaim deed to the mining claims covered by said lease and option to purchase agreement, or a release and discharge evidencing such termination. If said defendants had demanded such quitclaim deed or formal release and discharge from plaintiff, the same would have been furnished to them immediately. If said defendants had informed plaintiff that they took the position that such a quitclaim deed or formal release and discharge had to be furnished as a prerequisite to termination, the plaintiff would have furnished the same immediately.

10. On May 31, 1957, plaintiff deposited in the downtown office of The Valley National Bank of Phoenix, a national banking association, at Tucson, Arizona, the sum of $23,000, which is an amount in excess of the amount claimed by defendants to be

due from plaintiff under the terms and provisions of said lease and option to purchase agreement on said date and delivered with said deposit a letter of escrow instructions, copy of which is annexed hereto as Exhibit C.

11. On May 31, 1957, plaintiff caused to be served upon defendants a letter dated May 31, 1957, a copy of which is annexed hereto as Exhibit D; together with said letter dated May 31, 1957, the defendants were, on May 31, 1957, furnished with a quitclaim deed from the plaintiff and Dorothy Joralemon, his wife, quitclaiming to the defendants all right, title and interest the plaintiff and his wife had in and to the mining claims covered by said lease and option to purchase agreement; the statements contained in Exhibit D are incorporated herein.

Wherefore, plaintiff prays as follows:

1. For a declaration of the parties' rights and obligations under the lease and option to purchase agreement between plaintiff and defendants bearing the effective date of June 1, 1956.

2. An adjudication that the aforesaid lease and option to purchase agreement was terminated by service upon defendants of plaintiff's letter annexed hereto as Exhibit A.

3. Adjudicating that plaintiff has paid to defendants all sums the defendants are entitled to under said lease and option to purchase agreement.

4. Adjudicating that plaintiff is entitled to all of

the funds placed in escrow with The Valley National Bank of Phoenix as alleged herein.

5. For costs incurred herein by plaintiff.

6. For such other and further relief as may be proper.

BOYLE, BILBY, THOMPSON
& SHOENHAIR,
/s/ RALPH W. BILBY,
/s/ WILBERT E. DOLPH, JR.,
Attorneys for Plaintiff.

EXHIBIT A

November 5, 1956.

Mr. H. Greenway Albert,
P.O. Box 246,
Tombstone, Arizona.

Dear Greenway:

As we have found no ore in five drillholes, on your Cornelia group of claims, I am reluctantly forced to surrender the lease and option to me on the 39 claims in the Ajo mining district that was signed by you and Mrs. Albert on September 21, 1956. The $7000 payment due on November 8, 1956, will be paid when due, and the quitclaim deed specified in Paragraph 3 of the contract will be sent to you as soon as practicable.

While we found a little lean disseminated copper bearing porphyry in one hole, our drilling proved

that in most of the area either deep conglomerate or barren pre-Cambrian micaceous quartsite underlie 100 to 200 feet of alluvium. There is not room for a valuable ore body between these two barren formations.

I am sorry we did not have better luck in the exploration.

Yours sincerely,

/s/ IRA B. JORALEMON.

IBJ:B

cc: Mrs. Maja Greenway Albert
Mr. Charles E. Connor
Dr. D. H. McLaughlin
Mr. Kenneth C. Kellar

EXHIBIT B

(Copy)

Conner & Jones
509-514 Valley National Building
P.O. Box 310
Tucson, Arizona

April 16, 1957.

Mr. Ira B. Joralemon,
c/o Homestake Mining Company,
100 Bush Street,
San Francisco 4, California.

Re: Lease and Option to Purchase

Dear Mr. Joralemon:

We are writing this letter at the request of Mr. H. Greenway Albert and his wife, Maja Greenway Albert, of Tombstone, Arizona, in connection with that certain Lease and Option to Purchase which was entered into by and between H. Greenway Albert and Maja Greenway Albert, husband and wife, as lessors and optionors, and Ira B. Joralemon, as lessee and optionee.

We call attention to paragraph 2 of said agreement which provides that the lease shall commence as of the first day of June, 1956, and shall expire March 31, 1976, unless sooner terminated in the manner thereafter provided in said agreement. Paragraph 3 of said agreement provides that the lessee may at any time after the payment of the first quarterly payment of $7000.00 surrender the lease by giving notice in writing thereof to the lessors, accompanied by an executed and acknowledged quitclaim deed extinguishing all rights of the lessee thereunder and relinquishing to the lessors the demised properties. Said paragraph further provides that upon delivery of such notice and deed and the relinquishment of all of the demised properties, all rights and obligations of the parties thereto not then accrued shall cease and terminate, and also provides that lessee may not withdraw from said lease agreement between April 1st and July 1st of any year unless the assessment work for that year has been completed.

On November 5, 1956, you wrote a letter to Mr.

Albert in which you advised him that you were forced to surrender the lease and option. In your letter you further stated that the $7000.00 due on November 8, 1956, would be paid when due "and the quitclaim deed specified in paragraph 3 of the contract will be sent to you as soon as practicable." It is our opinion that your letter of November 8, 1956, in no way complies with the provisions of paragraph 3 of said agreement. Furthermore, as of this date no quitclaim deed, as provided for in said agreement, has been delivered to the lessors.

Therefore, it is our clients' position that the lease and option to purchase is still in full force and effect and they have advised us that there are five monthly payments of $1000.00 each due, and, also, the quarterly payment of $7000.00 due on February 8, 1957, has not been paid, and demand is hereby made upon you for the payment of said sums totaling $12,000.00, less that portion of the legal expense of $601.77 which you would be entitled to be reimbursed for.

In November of 1956, Mr. and Mrs. Albert received a check from the Homestake Mining Company for $3932.15 which purported to be the quarterly payment of $7000.00 due on November 8, 1956, from which you deducted the sum of $3067.85, claiming that to be the correct amount to deduct for legal expenses.

We wrote Mr. R. E. Driscoll, Jr., on November 21, 1956, advising him that our calculations showed that only the sum of $250.74 should have been de-

ducted from said payment of $7000.00. We also advised him that the $4000.00 which was paid in settlement of the suit to quiet title was not a legal expense under the terms of the contract.

On November 26, 1956, Mr. Driscoll advised us that we would no doubt be hearing from San Francisco, either directly or through his office, in the near future in reply to our letter of November 21, 1956. To date we have not received any such reply. However, on December 31, 1956, a check in the sum of $1286.52 was sent to Mr. Albert with the simple explanation that the same covered an error made in computation in regard to the prior check. Our calculation shows that you still owe Mr. and Mrs. Albert the sum of $1535.59 in connection with the quarterly payment due on November 8, 1956.

Our clients are assuming that you will live up to the terms of the Lease and Option to Purchase and do the assessment work on the mining claims covered by the agreement for this year.

Our clients take the position that the Lease and Option to Purchase agreement is still in full force and effect, and demand is hereby made upon you for full compliance therewith, and consequently have not cashed the checks mentioned in this letter, to wit, one for $3932.15 and one for $1286.52.

Yours very truly,

CONNER & JONES,

By /s/ CHARLES E. CONNER.

Copy to Dr. Donald H. McLaughlin.
" " Keller & Keller & Driscoll, Lead.

EXHIBIT C

Law Offices
Boyle, Bilby, Thompson & Shoenhair
Ninth Floor Valley National Building
Tucson 1, Arizona
Telephone MAin 3-8661

May 31, 1957.

The Valley National Bank of Phoenix,
Downtown Office,
Tucson, Arizona.

Gentlemen:

We are handing you herewith Cashier's Check in the sum of $23,000.00, payable to your order. This check is furnished you by Mr. Ira B. Joralemon and is to be held by you in escrow pursuant to the provisions of paragraph 14 of that certain Lease and Option to Purchase entered into between H. Greenway Albert and Maja Greenway Albert and the said Ira B. Joralemon as of June 1, 1956, until such time as the rights of the parties to said lease and option be determined, either by action in court or by arbiters, of which you will be duly advised.

We are also enclosing herewith a copy of said Lease and Option to Purchase above mentioned, together with a copy of a letter to Mr. and Mrs. Greenway Albert of date May 31, 1957, relating to this matter.

Very truly yours,

BOYLE, BILBY, THOMPSON & SHOENHAIR,

By /s/ RALPH W. BILBY.

RWB:LJE
Enc.

EXHIBIT D

Law Offices
Boyle, Bilby, Thompson & Shoenhair
Ninth Floor Valley National Building
Tucson 1, Arizona
Telephone MAin 3-8661

May 31, 1957.

Mr. H. Greenway Albert,
Mrs. Maja Greenway Albert,
Tombstone, Arizona.

Dear Mr. and Mrs. Albert:

We are attorneys for Mr. Ira B. Joralemon, with whom you entered into a Lease and Option to Purchase covering certain mining claims in Pima County, Arizona, known as Cornelia Extension A, B, C and D and Cornelia Nos. 1 to 35, inclusive, being a total of 39 mining claims. Said Lease and Option to Purchase was entered into as of June 1, 1956.

Under the provisions of said Lease and Option to Purchase Mr. Joralemon had the right to terminate

said lease and option and surrender the same by giving notice thereof to you in writing. Under date of November 5, 1956, Mr. Joralemon notified you in writing that he was surrendering the said lease and option and that a quitclaim deed, covering said mining claims, would be sent to you as soon as practicable.

Without in any manner receding from the position that said lease and option was terminated by Mr. Joralemon's written notice to you of date November 5, 1956, you are hereby further notified that said lease and option was then and is now hereby terminated.

On April 16, 1957, your attorneys, Messrs. Conner and Jones, notified Mr. Joralemon by letter of date April 16, 1957, that, according to your contention, the lease and option had not been terminated by Mr. Joralemon's letter of November 5, 1956, and that you were claiming that the said lease and option was still in effect and that certain payments were due you as in said letter specified.

From reading said letter we take it that you and your attorneys contend that there is now due you under said lease and option the sum of $22,535.59.

We have, therefore, pursuant to the provisions of paragraph 14 of said lease and option, placed an amount in excess of said sum in escrow with The Valley National Bank of Phoenix at its Downtown Office in Tucson, Arizona, with instructions to hold the same in escrow until decision of court or ar-

biters as the parties may elect as to the rights of the parties under the circumstances. We enclose herewith a copy of our letter of instructions to the said The Valley National Bank of Phoenix covering said escrow.

You are also hereby advised that, although it is Mr. Joralemon's position that he is not required to do the annual assessment work on your mining claims, said assessment work was done for the year 1956-1957 prior to November 5, 1956, and for your convenience an affidavit establishing the fact that said annual assessment work was done will be placed of record in the office of the County Recorder of Pima County, Arizona, and a copy thereof furnished to you, all prior to July 1, 1957.

There is also enclosed herewith a quitclaim deed covering all of said mining claims running from Mr. Joralemon and his wife to yourselves although you have made no demand therefor.

Very truly yours,

BOYLE, BILBY, THOMPSON & SHOENHAIR,

By /s/ RALPH W. BILBY.

RWB:LJE
Enc.

[Endorsed]: Filed May 31, 1957.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Defendants answer Plaintiff's complaint as follows;

I.

They admit the allegations of Paragraphs I and II.

II.

They admit the allegations of Paragraph III, and they allege that the said Lease and Option to Purchase Agreement contained many other provisions bearing upon the matters and things set forth in Plaintiff's Complaint.

III.

They deny the allegations of Paragraph IV with respect to the times of the filing of the said Quiet Title action and the settlement thereof, and allege that said Quiet Title action was instituted, settled and fully disposed of prior to the execution of the Lease and Option to Purchase Agreement. They admit that Plaintiff incurred attorney's fees and costs in the amount alleged. They admit that the sum of Four Thousand and No/100 ($4,000.00) Dollars was paid by the Plaintiff to settle the said Quiet Title action. They admit that the incurring of the said fees and costs and the settlement of said action were done with the consent and approval of the Defendants. They allege that the Plaintiff paid said sum of Four Thousand and No/100 ($4,000.00) Dollars in settlement of said Quiet Title action

upon the agreement of the parties that Plaintiff could do so with his own money if he wished to, without any right of reimbursement by the Defendants.

IV.

They admit the allegations of Paragraphs V and VI.

V.

They state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VII except they admit that Plaintiff took no further steps toward the termination of said agreement.

VI.

They deny that they failed to advise the Plaintiff in any respect whatsoever and allege that they conformed strictly with the terms of the written contract. Defendants admit that they assert that the payments provided for under said Lease and Option continued to accrue and have accrued in accordance with the terms of said contract to the 31st day of May, 1957.

VII.

They state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IX.

VIII.

They admit the allegations of Paragraphs X and XI.

IX.

They allege that the said Contract of Lease and Option remained in full force and effect until terminated May 31, 1957, and that Plaintiff is now indebted to the Defendants in accordance with the terms of said contract.

Wherefore, Defendants pray that Plaintiff take nothing by his Complaint and that Defendants recover their costs and for all of the proper relief.

McCARTY, CHANDLER & UDALL,

By /s/ CHARLES D. McCARTY,
Attorneys for Defendants.

Counterclaim

Defendants by way of Counterclaim against the Plaintiff allege:

I.

In the month of September, 1956, Plaintiff and Defendants entered into a Lease and Option to Purchase certain mining claims in Pima County, Arizona.

II.

Said Lease and Option to Purchase was terminated pursuant to the power to terminate therein contained by the Plaintiff May 31, 1957.

III.

Pursuant to the terms of said Lease and Option to Purchase, Plaintiff became and now is indebted to the Defendants in the sum of Twenty-one

Thousand One Hundred Seventy-nine and 56/100 ($21,179.56) Dollars, together with interest from due dates which said sum the Plaintiff has refused and does now refuse to pay, although proper demand has been made for payment.

Wherefore, Defendants pray judgment against the Plaintiff in the sum of Twenty-one Thousand One Hundred Seventy-nine and 56/100 ($21,179.56) Dollars, together with interest at the legal rate from due dates until paid and for all of the proper relief.

McCARTY, CHANDLER
& UDALL,

By /s/ CHARLES D. McCARTY,
Attorneys for Defendants.

Affidavit of mail attached.

[Endorsed]: Filed July 5, 1957.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Comes now plaintiff in the above entitled action and replies to the counterclaim filed herein by the defendants as follows:

1. Admits the allegations contained in paragraph I.

2. Denies the allegations contained in paragraph II and in this connection alleges that said

Lease and Option to Purchase Agreement was terminated on November 5, 1956.

3. Denies the allegations contained in paragraph III.

Wherefore, Plaintiff prays that Defendants take nothing by their counterclaim.

BOYLE, BILBY, THOMPSON & SHOENHAIR,

/s/ WILBERT E. DOLPH, JR.,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause,]

MINUTE ENTRY OF FRIDAY, OCTOBER 4, 1957

Tucson Division

Honorable James A. Walsh,
United States District Judge, Presiding

Wilbert Dolph, Esq., appears for the plaintiff; Charles D. McCarty, Esq., is present for the defendants. Pretrial hearing is now had. The Defendants are granted leave to amend counterclaim to add an additional count covering claimed cause of action for counter-defendants' removal of well casing from leased premises. The Court orders separate trial of issues which will be formed by such count, and counter-defendants' answer thereto.

It is stipulated that the letter marked (1) in pencil by the Court may be received in evidence without foundational proof if ruled otherwise admissible.

It is stipulated that the vouchers marked 2 to 7, inclusive, in pencil by the Court may be received in evidence on trial upon offer by either party.

[Title of District Court and Cause.]

AMENDED COUNTERCLAIM

Defendants by way of Counterclaim against the Plaintiff allege:

Count One

I.

In the month of September, 1956, Plaintiff and Defendants entered into a Lease and Option to Purchase certain mining claims in Pima County, Arizona.

II.

Said Lease and Option to Purchase was terminated pursuant to the power to terminate therein contained by the Plaintiff, May 31, 1957.

III.

Pursuant to the terms of said Lease and Option to Purchase, Plaintiff became and now is indebted to the Defendants in the sum of Twenty-One Thousand One Hundred Seventy-Nine and 56/100 ($21,179.56) Dollars, together with interest from

due dates which said sum the Plaintiff has refused and does now refuse to pay, although proper demand has been made for payment.

Count Two

I.

In the month of September, 1956, Plaintiff and Defendants entered into a Lease and Option to Purchase certain mining claims in Pima County, Arizona.

II.

That at the time of the execution of said Lease and Option it was within the contemplation of the parties that the Plaintiff would do certain exploration work on the leased premises and would among other things cause test holes to be drilled on the said property and casing to be installed in said test holes. Said Lease and Option further provided that no casing would be removed from test holes until Plaintiff had paid to Defendants the sum of Twenty-Five Thousand and No/100 ($25,000.00) Dollars. That thereafter Plaintiff took possession of said leased premises and caused test holes to be drilled and casing to be installed in said test holes. That notwithstanding the fact that the Plaintiff had not and has not paid to the Defendants the sum of Twenty-Five Thousand and No/100 ($25,000.00) Dollars, and notwithstanding the provisions of the said Lease and Option, Plaintiff removed or caused to be removed the casing from some or all of the said test holes.

III.

That by virtue of the provisions of said Lease and Option Agreement, Plaintiff is indebted to the Defendants in the sum of Twenty-Five Thousand and No/100 ($25,000.00) Dollars less sums heretofore paid by Plaintiff to Defendants and less whatever further sums may be adjudicated to be due and owing to Defendants by the Plaintiff under Count One of this Counterclaim.

Wherefore, Defendants pray judgment against the Plaintiff in the sum of Twenty-Five Thousand and No/100 ($25,000.00) Dollars, subject however to a credit for sums heretofore paid by the Plaintiff to Defendants, and subject to a future credit for such sums as may be adjudicated due and payable to Defendants by Plaintiff under Count One of this Counterclaim, together with interest at the legal rate from due date until paid and for all of the proper relief.

McCARTY, CHANDLER
& UDALL,

By /s/ CHARLES D. McCARTY,
Attorneys for Defendants.

Affidavit of mail attached.

[Endorsed]: Filed October 8, 1957.

[Title of District Court and Cause.]

REPLY TO AMENDED COUNTERCLAIM

Comes Now the plaintiff and replies to defendants' amended counterclaim as follows:

Count One

1. Admits the allegations contained in paragraph I.

2. Denies the allegations contained in paragraph II, and in this connection alleges that said Lease and Option to Purchase agreement was terminated November 5, 1956.

3. Denies the allegations contained in paragraph III.

Count Two

1. Admits the allegations contained in paragraph I.

2. Referring to the allegations contained in paragraph II, plaintiff admits that it was within the contemplation of the parties that the plaintiff would do certain exploration work on the leased premises and would cause test holes to be drilled on said property and that no casing would be removed from said test holes until plaintiff had paid to defendants the sum of $25,000.00 under the schedule of payments provided in said agreement, and that plaintiff caused certain test holes to be drilled on said premises and that the plaintiff had not, and

has not, paid to defendants the sum of $25,000.00. Plaintiff denies that it was ever the contemplation or agreement of the parties that casing was to be installed in all of said test holes or in any of said test holes necessarily, and denies that plaintiff has removed or caused to be removed the casing from some or all of said test holes. In this connection plaintiff alleges that the agreement between the parties required the plaintiff to leave the casing in such test holes only where such casing was necessary, and further alleges that no casing was removed or caused to be removed from said test holes by plaintiff.

3. Denies the allegations contained in paragraph III.

4. Denies all allegations in Count Two not expressly admitted herein.

Wherefore, plaintiff prays that defendants take nothing by their amended counterclaim.

BOYLE, BILBY, THOMPSON & SHOENHAIR,

/s/ WILBERT E. DOLPH, JR.,
Attorneys for Plaintiff.

Affidavit of mail attached.

[Endorsed]: Filed October 10, 1957.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY, FEBRURY 21, 1958

Honorable James A. Walsh, United States District Judge, Presiding.

This case comes on regularly for trial this day before the Court sitting without a jury. The plaintiff Ira B. Joralemon is present with his counsel, Ralph Bilby, Esq., and Wilbert Dolph, Esq. The defendant H. Greenway Albert is present with his counsel, Charles D. McCarty, Esq. On motion of said counsel for the defendants.

It Is Ordered that Charles Gatewood, Esq., is associated as counsel for the defendants herein.

On stipulation of counsel,

It Is Ordered that Count 2 of the amended counterclaim is stricken.

Counsel for the plaintiff move to amend the complaint to show "plaintiff is a resident and citizen of San Francisco, California, and that the defendants are residents and citizens of the State of Arizona."

Counsel stipulate to amend allegation V of the complaint.

Both sides announce ready for trial.

Wilbert Dolph, Esq., makes the opening statement on behalf of the plaintiff. Charles D. McCarty, Esq., makes the opening statement on behalf of the defendants.

Plaintiff's Case

Ira B. Joralemon is sworn and examined on his own behalf.

The following plaintiff's exhibits are admitted in evidence: 1, agreement; 2, agreement; 3, agreement; 4, copy of letter; 5, letter; 6, letter; 7, copy of letter.

The following defendants' exhibits are admitted in evidence: B, copy of letter; A, copy of letter; C, letter; D, letter.

Robert E. Driscoll, Jr., is sworn and examined.

The following plaintiff's exhibits are admitted in evidence: 8, memo agreement; 9, letter; 10, letter.

The following defendants' exhibits are admitted in evidence: E, letter; G, copy of agreement.

And thereupon, at 12:00 noon, It is Ordered that the further trial of this case is continued to 1:30 p.m. this date, to which time counsel and all parties are excused. Subsequently, at 1:30 p.m., all counsel and parties being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued

Robert E. Driscoll, Jr., is recalled and further examined.

The following defendants' exhibits are admitted in evidence: I, lease and option to purchase; K, letter; L, memorandum.

H. Greenway Albert is sworn and cross-examined by the plaintiff.

Whereupon, the plaintiff rests.

Defendants' Case

Counsel stipulate that payments were made by the plaintiff to the defendants as follows:

> $2,000.00 prior to September 20, 1956, pursuant to 8a of Agreement. $1,000.00 on September 26, 1956, pursuant to paragraph 8c of Agreement. $1,000.00 on October 7, 1956, pursuant to Paragraph 8e of Agreement. $1,000.00 on November 6, 1956, pursuant to Paragraph 8e of Agreement.

that further payment was made on November 6, 1956, in the amount of $3,932.15; that a payment was made on December 31, 1956, in the amount of $1,286.52; that in all cases the dates are the dates appearing on vouchers themselves; and that the vouchers may be admitted in evidence.

The following defendants' exhibits are admitted in evidence: M, vouchers; J, lease and option to purchase; H, copy of letter.

Whereupon, the defendants rest.

Memorandums are to be submitted by counsel 15 days from this date, memoranda to be submitted simultaneously, and that when memorandums have been filed, the matter will stand submitted and by the Court taken under advisement.

[Title of District Court and Cause.]

OPINION

Minute Entry of Tuesday, March 25, 1958

Honorable James A. Walsh, United States District Judge, Presiding.

The Court concludes, inter alia, that:

1. The payment of the first quarterly payment of $7,000.00 (less a deduction computed in accordance with Paragraph 7 of Exhibit 3 In Evidence for legal expense incurred in clearing title to the mining claims) was a condition precedent to the exercise by plaintiff of his option to terminate the lease.

2. The $4,000.00 paid on behalf of the plaintiff to compromise the quiet title action was not a legal expense within the meaning of the lease and option contract.

3. The delivery to defendants of an executed and acknowledged quitclaim deed was a condition precedent to the exercise by plaintiff of his option to terminate the lease.

4. Defendants are not estopped to claim and contend that Exhibit 3 In Evidence remained in force and effect and that plaintiff's obligations thereunder continued to accrue and be binding until May 31, 1957, when plaintiff terminated the lease and option.

5. Defendants are entitled to judgment on count one of their amended counterclaim, in accordance with the foregoing.

Defendants will prepare, serve and lodge proposed findings of fact, conclusions of law, and formal judgment in accordance with the local rules.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, MAY 5, 1958

Honorable James A. Walsh, United States District Judge, Presiding.

This case comes on regularly this day for settlement of Findings. Ralph Bilby, Esq., and Wilbert Dolph, Esq., appear for the plaintiff. Charles D. McCarty, Esq., appears for the defendants. Hearing is now had, and the matter is submitted for review by the Court in light of the arguments.

[Title of District Court and Cause.]

MINUTE ENTRY OF TUESDAY, JUNE 10, 1958

Honorable James A. Walsh, United States District Judge, Presiding.

This case comes on regularly this day for settlement of findings. Wilbert Dolph, Esq., appears for the plaintiff; Charles D. McCarty, Esq., appears for the defendants.

Findings of Fact and Conclusions of Law are now signed by the Court and filed with the Clerk.

It Is Ordered that counsel for the plaintiff is to prepare form of judgment.

[Title of District Court and Cause.]

Oral Argument Requested

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY PLAINTIFF

Comes Now plaintiff and proposes that the Court make the following findings of fact and conclusions of law.

Findings of Fact

1. The plaintiff as lessee and the defendants as lessors entered into the following agreements on the dates indicated beside each:

Exhibit 1 on March 21, 1956;
Exhibit 2 on May 16, 1956;
Exhibit 3 during September, 1956.

2. Exhibit 2 was negotiated and executed for the primary purpose of providing for the matter of clearing a cloud from the title of the mining claims referred to therein.

3. Exhibit 2 was prepared by defendants' attorney.

4. The firm of Conner & Jones, as attorneys for the defendants in this action, instituted an action

and conducted negotiations resulting in the elimination of the cloud on the title referred to in finding No. 2 above.

5. The defendants incurred expenses in connection with clearing said cloud as follows:

$4,000.00 as consideration for a release of all claims;

$601.77 as attorneys' fees and costs incident to quiet title action.

The plaintiff supplied the funds with which said expenses were paid, with the consent and approval of the defendants Albert.

6. The cloud on the title referred to above was cleared in the latter part of August, 1956.

7. Subsequent to August, 1956, the plaintiff paid, or procured the payment, to the defendants of the following amounts at the following times.

$1,000.00 on or about September 20, 1956;
$1,000.00 on or about October 7, 1956;
$1,000.00 on or about November 6, 1956;
$3,932.15 on or about November 6, 1956;
$1,286.52 on or about January 4, 1957.

8. The defendants, within a few days after November 5, 1956, received the letter, a copy of which is Exhibit 4 in evidence. The defendants realized, upon receiving said letter, that the plaintiff intended to terminate the agreement which is Exhibit 3 in evidence and that plaintiff intended said letter to serve as notice of such termination.

9. On or about November 16, 1956, the defendant, Mr. Albert, telephoned the plaintiff in San Francisco. During his conversation with the plaintiff Mr. Albert stated that he was not satisfied with the amount of money he had received on or about November 6, 1956. During this conversation the plaintiff again informed said defendant that he intended to terminate the lease agreement which is Exhibit 3 in evidence. Said defendant thereupon requested information from the drilling logs on the mining claims covered by said lease, but did not state that he considered the payment of any certain amount or the delivery of a quitclaim deed as a condition precedent to the exercise of the plaintiff's option to terminate.

10. Shortly after November 16, 1956, the defendant, Mr. Albert, went to his attorney and discussed with him the matter of the payment called for under paragraph 8(c) of Exhibit 3 in evidence, and also asked his attorney whether the defendants were entitled to a quitclaim deed on the strength of the plaintiff's letter dated November 5, 1956. The defendants' attorney thereupon advised the defendant, Mr. Albert, that he had a right to demand such a deed; this same advice was given to the defendant again in March, 1957.

11. The information requested by the defendant, Mr. Albert, in his telephone conversation of November 16, 1956, was promptly furnished by the plaintiff in his letter, which is Exhibit 5 in evidence.

12. On April 16, 1957, the defendants' attorney, at the request of defendants, prepared and sent to

the plaintiff a letter, copy of which is Exhibit 7 in evidence.

13. Neither of the defendants nor anybody acting for them ever advised the plaintiff or any of plaintiff's agents, prior to the delivery of Exhibit 7, that the defendants took the position that either the payment of an additional amount on the quarterly payment falling due November 8, 1956, or the delivery of a quitclaim deed was a condition precedent to the termination of the lease by the plaintiff.

14. On or about November 21, 1956, the defendant, Mr. Albert, had his attorney prepare and send to the plaintiff's attorney a letter which appears as Exhibit 6 in evidence.

15. If the defendants or either of them had stated to the plaintiff that they took the position that payment of the correct amount on the quarterly payment falling due November 8, 1956, was a condition precedent to the plaintiff's right to terminate, the plaintiff would have immediately either paid the amount they claimed to be correct or deposited said amount in escrow.

16. If the defendants or either of them had either demanded from the plaintiff a quitclaim deed or stated to the plaintiff that they took the position that the delivery of a quitclaim deed was a condition precedent to the plaintiff's right to terminate, the plaintiff would have immediately furnished to them such a quitclaim deed.

17. The plaintiff's failure to either pay to the defendants the amount they claimed to be proper under the quarterly payment falling due November 8, 1956, or to deposit said amount in escrow was due to the defendants' failure to inform the plaintiff that the defendants took the position that the payment of said amount was a condition precedent to the plaintiff's right to terminate.

18. The plaintiff's failure to furnish the defendants with a quitclaim deed immediately after November 5, 1956, was due to the defendants' failure to either demand such a quitclaim deed or to inform the plaintiff that the arrangement suggested by plaintiff of supplying said deed at a later date was not satisfactory, or that the defendants took the position that the delivery of such a quitclaim deed was a condition precedent to plaintiff's right to terminate.

19. The actions of the defendants between November 5, 1956, and April 16, 1957, led the plaintiff to believe that the lease had been terminated and that the defendants' only claim against the plaintiff was a claim for an additional amount on the quarterly payment falling due November 8, 1956.

20. Subsequent to November 5, 1956, plaintiff was led to believe, by the defendants' actions, that there had been a termination of the lease and in reliance upon such belief the plaintiff took no further steps to perfect a termination until after plaintiff received the letter which is Exhibit 7 in evidence.

21. The defendants suffered no damages as a result of plaintiff's failure to pay a larger amount on the first quarterly payment except to the extent of the difference between the amount which was paid and the amount which should have been paid. (This finding of fact is proposed only in the event the Court should conclude that the plaintiff was not entitled to deduct any portion of the $4,000.00 item.)

22. Defendants suffered no damage as the result of plaintiff's failure to deliver them a quitclaim deed at an earlier date.

23. On May 31, 1957, the plaintiff deposited in the downtown office of the The Valley National Bank of Phoenix, a national banking association, at Tucson, Arizona, the sum of $23,000, together with a letter of escrow instructions, copy of which is annexed to plaintiff's complaint as Exhibit C.

24. On May 31, 1957, plaintiff caused to be served upon defendants a letter, copy of which is annexed to plaintiff's complaint as Exhibit D, and furnished defendants with a deed from plaintiff and his wife quitclaiming to defendants all right, title and interest the plaintiff and his wife had in and to the mining claims covered by Exhibit 3 in evidence.

25. The Court finds on stipulation of the parties that the plaintiff had performed all obligations required of the plaintiff under Exhibit 3 in evi-

dence, with the exception of the disputed issues of the payment of the first quarterly installment and the delivery of a quitclaim deed.

Conclusions of Law

1. The payment of the first quarterly payment of $7,000.00 was not a condition precedent to the exercise by the plaintiff of his option to terminate the contract.

2. The sum of $4,000.00 paid on behalf of the plaintiff to compromise the quiet title action was a legal expense within the meaning of the contract.

3. The execution, acknowledgment and delivery to the defendants of a quitclaim deed, releasing the property described in the contract to the defendants, was not a condition to the exercise by the plaintiff of his option to terminate the contract.

4. The contract of lease and option was terminated by the plaintiff by the letter of November 5, 1956, a copy of which is plaintiff's Exhibit 4 in evidence.

5. Under the terms of Exhibit 3 in evidence the plaintiff unconditionally promised and covenanted to pay defendants the first quarterly payment of $7,000.00 less proper deductions and plaintiff was obligated to make such payment whether or not he had served notice of termination prior to the due date for such payment.

6. Under the terms of Exhibit 3 in evidence the plaintiff had the right to terminate the lease as to

all or any portion of the claims covered by said lease, and after the service of notice of any such termination the plaintiff had the right to occupy the premises referred to in such notice of termination for a period of 90 days after such termination.

7. Under the terms of Exhibit 3 in evidence the plaintiff promised and covenanted to furnish to the defendants, after the expiration of 90 days from the date of termination as to any portion of the claims covered by said lease, a quitclaim deed or release covering the portion of the property as to which the lease was terminated, and the defendants were entitled to recover from the plaintiff any damages sustained by said defendants as a result of the plaintiff's failure to comply with said obligation.

8. Under the terms of Exhibit 3 in evidence the defendants were not entitled to a quitclaim deed or formal release covering any claims described in a notice of termination served by plaintiff until the expiration of 90 days from the date of such termination.

9. After the expiration of 90 days from the date the defendants received the plaintiff's letter of November 5, 1956, the defendants would have been entitled to a judgment against the plaintiff, quieting the defendants' title in and to all of the mining claims covered by Exhibit 3 in evidence.

10. Defendants are estopped to claim and con-

tend that Exhibit 3 in evidence remained in force and effect and that plaintiff's obligations thereunder continued to accrue and be binding after November 5, 1956, when plaintiff terminated the lease and option.

11. Plaintiff is not indebted to defendants.

12. Plaintiff is entitled to all money deposited in escrow with The Valley National Bank of Phoenix, as alleged in plaintiff's complaint.

13. Plaintiff is entitled to judgment in accordance with these conclusions.

BOYLE, BILBY, THOMPSON & SHOENHAIR,

/s/ RICHARD B. EVANS,

/s/ WILBERT E. DOLPH, JR.,
Attorneys for Plaintiff.

Affidavit of mail attached.

Lodged April 3, 1958.

[Endorsed]: Filed June 10, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS

The Court makes the following Findings of Fact:

1. On or about September 21, 1956, Plaintiff and Defendants entered into a Lease and Option to

purchase agreement wherein Defendants leased to Plaintiff certain unpatented mining claims in Pima County, Arizona. Said Lease and Option agreement provided for the payment by Plaintiff to Defendants of One Thousand Dollars ($1,000.00) per month rent, plus a quarterly rental payment of Seven Thousand Dollars ($7,000.00). Said Lease and option agreement further provided that Plaintiff might terminate the same after the payment of the first quarterly payment of Seven Thousand Dollars ($7,000.00), by giving to Defendants notice in writing of termination, accompanied by an executed and acknowledged quitclaim deed of the demised premises.

2. On or about November 5, 1956, Plaintiff mailed to Defendants a letter stating that Plaintiff was reluctantly forced to surrender the Lease, stating that the Seven Thousand Dollars ($7,000.00) payment due November 8, 1956, would be paid when due, and further stating that the quitclaim deed provided for in the Lease and Option agreement would be sent to the Defendants as soon as practicable. Said letter was duly received by the Defendants in the due course of the mail.

3. On or about November 6, 1956, Plaintiff by and through his agents mailed to Defendants a check for One Thousand Dollars ($1,000.00) representing the regular monthly rental payment, and a check for Three Thousand Nine Hundred Thirty-two and 15/100 Dollars ($3,932.15), representing the first quarterly rental payment of Seven Thou-

sand Dollars ($7,000.00) less amounts claimed by Plaintiff to be deductible under the contract as legal expense incident to clearing title to the demised premises.

4. On or about November 16, 1956, Defendant Mr. Albert telephoned Plaintiff in San Francisco requesting copies of the logs of the five holes drilled by plaintiff on the demised premises and expressing dissatisfaction over the remittance of November 6, stating that the believed defendants had been underpaid. At this time Plaintiff agreed to send copies of the drilling logs and explained that the adjustment of the difference between them as to money matters would be placed in the hands of his attorneys. Plaintiff promptly sent to defendants the drilling logs requested.

5. On or about November 21, 1956, Defendants through their attorney mailed to the Plaintiff, through his attorney, a letter asserting that the payment of Three Thousand Nine Hundred Thirty-two and 15/100 Dollars ($3,932.15) was not proper and that Plaintiff was still indebted to the Defendants on account of the first quarterly payment.

6. On or about November 26, 1956, Plaintiff, through his attorney, responded to Defendants' letter of November 21 disagreeing with the position of the Defendants and stating that the Defendants would be hearing from San Francisco either direct or through the office of Plaintiff's attorney.

7. On or about January 4, 1957, Plaintiff,

through his agents, mailed to Defendants a check in the sum of One Thousand Two Hundred Eighty-six and 52/100 Dollars ($1,286.52), representing an additional payment on account of the first quarterly payment of Seven Thousand Dollars ($7,000.00) accompanied by a letter stating that the remittance of Three Thousand Nine Hundred Thirty-two and 15/100 Dollars ($3,932.15) which was made November 6, 1956, had been the result of an error in computation.

8. Neither the check for One Thousand Two Hundred Eighty-six and 52/100 Dollars ($1,286.52) nor the check for Three Thousand Nine Hundred Thirty-two and 15/100 Dollars ($3,932.15) were negotiated by the Defendants until after the institution of this litigation.

9. Following receipt of Plaintiff's letter of November 5, and prior to the institution of this litigation the only communication from Plaintiff to Defendants was the telephone call of November 16 from Defendant Mr. Albert to Plaintiff Mr. Driscoll's letter of November 26, the Homestake Mining Company letter of January 4, 1957, enclosing the check, and a letter from Plaintiff dated May 21, 1957, in which Plaintiff stated that he took the position that the Lease had been cancelled by Plaintiff's letter of November 5.

10. On or about May 31, 1957, Plaintiff, through his attorney, mailed to Defendants a letter enclosing a quitclaim deed duly executed and acknowledged.

Said letter and deed were received by Defendants in due course of the mail. On or about May 31, Plaintiff deposited the sum of Twenty-three Thousand Dollars ($23,000.00) in escrow in the Tucson Downtown Office of the Valley National Bank of Phoenix pursuant to the provisions of paragraph 14 of the Lease and Option agreement.

11. At no time prior to May 31, 1957, did the Plaintiff deliver or tender a quitclaim deed to the premises to the Defendants.

12. The total amount paid by Plaintiff to Defendants under the Lease and Option agreement and on account of the quarterly payment of Seven Thousand Dollars ($7,000.00) due November 8, 1956, is the sum of Five Thousand Two Hundred Eighteen and 67/100 Dollars ($5,218.67).

13. When the parties entered into the lease and option it was the intention that Plaintiff could not terminate the lease before, nor until he had made payment of the first quarterly payment of Seven Thousand Dollars ($7,000.00), and it was their intention at that time, also, that Plaintiff could not terminate the lease before, nor until he executed and delivered to Defendants a quitclaim deed duly acknowledged, quitclaiming to Defendants the demised premises.

15. Neither of the Defendants made any statement or admission or committed any act which indicated to Plaintiff that Defendants did not intend to require the quitclaim deed and the payment of

the first quarterly payment of Seven Thousand Dollars ($7,000.00), subject to adjustment for proration of legal expense.

16. The failure to deliver the quitclaim deed to the Defendants promptly after 11/6/56 was occasioned by the oversight of John W. Hamilton, secretary of the Homestake Mining Company, or of some other officer or agent of the Homestake Mining Company, and the said John W. Hamilton or such other officer or agent of the Homestake Mining Company in such oversight, were acting as the agents of the Plaintiff within the scope of their authority.

17. The failure of the Plaintiff and of the Homestake Mining Company to deliver the quitclaim deed to the Defendants was not occasioned by any admission, statement, act, or omission of the Defendants, or either of them.

18. The failure to make proper remittance in connection with the Seven Thousand Dollars ($7,000.00) quarterly payment was occasioned by a dispute between the parties as to what portion of said payment was properly offset by expenditures made by Plaintiff in claiming title to the demised premises and as to the proper proration period of such expenditures.

19. The failure of the Plaintiff and the Homestake Mining Company to make proper payment of the first Seven Thousand Dollars ($7,000.00) quarterly payment was not occasioned by Plaintiff's

reliance upon any admission, statement, act, or omission of the Defendants, or either of them.

The Court makes the following Conclusions of Law:

1. The payment of the first quarterly payment of Seven Thousand Dollars ($7,000.00) was a condition precedent to the exercise by the Plaintiff of his option to terminate the contract.

2. The sum of Four Thousand Dollars ($4,000.00) paid on behalf of the Plaintiff to compromise the quiet title action was not a legal expense within the meaning of the contract.

3. The execution, acknowledgment, and delivery to the Defendants of a quitclaim deed, releasing the property described in the contract to the Defendants, was a condition precedent to the exercise by the Plaintiff of his option to terminate the contract.

4. The contract of lease and option was terminated by the Plaintiff by the letter of May 31, 1957, a copy of which is attached as Exhibit B to Plaintiff's Complaint.

5. Defendants are not estopped to claim and contend that Exhibit 3 in evidence remained in force and effect and that Plaintiff's obligations thereunder continued to accrue and be binding until May 31, 1957, when Plaintiff terminated the lease and option.

6. Defendants are entitled to Judgment against

the Plaintiff in the following amounts on the following due dates:

a. Interest on the sum of Two Thousand Six Hundred Sixteen and 52/100 Dollars ($2,616.52) from November 8, 1956, to January 8, 1957, at six per cent (6%) per annum. (This was the deficiency on the payment of the first quarterly payment.)

b. The sum of One Thousand Three Hundred Thirty Dollars ($1,330.00) together with interest thereon from the 8th day of January, 1957, until paid at the rate of six per cent (6%) per annum. (This is the amount still remaining unpaid on the first quarterly payment.)

c. The sum of One Thousand Dollars ($1,000.00) together with interest thereon at the rate of six per cent (6%) per annum from the 8th day of December, 1956, until paid.

d. The sum of One Thousand Dollars ($1,000.00) together with interest thereon at the rate of six per cent (6%) per annum from the 8th day of January, 1957, until paid.

e. The sum of Eight Thousand Dollars ($8,000.00) together with interest thereon at the rate of six per cent (6%) per annum from the 8th day of February, 1957, until paid. (This represents the regular monthly payment of One Thousand Dollars ($1,000.00) plus the second quarterly payment of Seven Thousand Dollars ($7,000.00).)

f. The sum of One Thousand Dollars ($1,000.00) together with interest thereon at the rate of six

per cent (6%) per annum from the 8th day of March, 1957, until paid.

g. The sum of One Thousand Dollars ($1,000.00) together with interest thereon at the rate of six per cent (6%) per annum from the 8th day of April, 1957, until paid.

h. The sum of Eight Thousand Dollars ($8,000.00) together with interest thereon at the rate of six per cent (6%) per annum from the 8th day of May, 1957, until paid. (This represents the regular monthly payment of One Thousand Dollars ($1,000.00) plus the third quarterly payment of Seven Thousand Dollars ($7,000.00).)

i. For the costs of the Defendants herein incurred and expended.

Dated this .... day of ....., 1958.

.....,
Judge of the District Court.

Receipt of copy acknowledged.

Lodged March 28, 1958.

[Endorsed]: Filed June 10, 1958.

[Printer's Note: This document set out as corrected by penciled corrections on original.]

[Title of District Court and Cause.]

Oral Argument Requested

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS

Comes Now plaintiff and objects to the proposed findings of fact and conclusions of law submitted by defendants as follows:

Proposed Findings of Fact

1. The first sentence of finding No. 1 is properly a finding of fact. The balance of said proposed finding, however, if appropriate in any place should be under conclusions of law.

2. Defendants' proposed findings Nos. 2, 3, 4, 5, 6 and 7 are attempts to paraphrase what is stated in written instruments in evidence which are themselves the best evidence; the Court should limit its findings in this regard to the facts as to who prepared and sent such instruments, who received them and the times when sent and received, identifying such instruments by their exhibit numbers.

3. Defendants' proposed finding No. 9 is improper in that it fails to refer to plaintiff's letter of November 16, 1956 (Exhibit 5), in which the plaintiff reiterates his intention to terminate and which furnishes the defendant, Mr. Albert, with the information he requested in the telephone call. This proposed finding is improper for the further

reason that it is immaterial; it merely negatives something plaintiff does not claim to exist.

4. Defendants' proposed finding No. 12 combines a fact with a conclusion. The evidence showed that there was paid on November 6, 1956, the sum of $4,932.15 and that there was a further sum of $1,286.52 paid on January 4, 1957. It is also a fact that the total of $5,218.67 was designated by the plaintiff as payment under the quarterly payment provision. It is the position of the plaintiff, however, that on November 6, 1956, after the notice of termination had been sent, only a pro rata share of the monthly payment of $1,000.00 was required to be made and, therefore, that the excess of the $1,000.00 check, over and above this pro rata share, should have been applied in satisfaction of any additional amounts which should have been paid on the quarterly payment.

5. Defendants' proposed finding No. 13 should be designated a conclusion from the documentary evidence rather than a finding of fact. This is for the reason that there is no evidence showing that the parties had such an intention and any holding by the Court that the quarterly payment was a condition precedent to the plaintiff's exercise to terminate is of necessity a legal conclusion of the Court from the documents and instruments in evidence and should be designated as such.

6. Defendants' proposed finding No. 14 is subject to the same objections as stated above to defendants' proposed finding No. 13.

7. Defendants' proposed finding No. 15 is improper because the defendants by their actions did lead the plaintiff to believe that they were acting upon the proposition that the plaintiff had terminated the lease, and that the quitclaim deed and the payment of the first quarterly payment of $7,000.00 were not conditions precedent to such a termination.

8. Defendants' proposed finding No. 16 is incomplete in that it fails to state that one of the reasons for the plaintiff's failure to deliver the quitclaim deed was the defendants' failure to demand such a quitclaim deed.

9. Defendants' proposed finding No. 11 is contrary to the evidence. The plaintiff's letter of November 5, 1956, contains his promise to furnish the deed in question, and this promise was never withdrawn or changed in any regard.

10. Defendants' proposed finding No. 17 is contrary to the evidence, which shows that the plaintiff would have immediately furnished a quitclaim deed if the defendants had demanded one and further shows that the acts of the defendant, Mr. Albert, were designed to and did entitle the plaintiff to assume that there had been a termination.

11. Defendants' proposed finding No. 18 is contrary to the evidence. The evidence shows that the failure to pay to the defendants the amount the defendants claim to be due under the $7,000.00 quarterly payment provision was due mainly to a

legitimate dispute between the parties as to what the proper amount was. This proposed finding is also misleading in that it fails to set forth that plaintiff's failure to take further steps in this connection to protect his right to terminate was occasioned by defendants' tacit acceptance of termination and the arrangements for determining any amounts due under said provision.

12. Defendants' proposed finding No. 19 is absolutely contrary to the evidence.

Proposed Conclusions of Law

The defendants' proposed conclusions of law are improper under the evidence and the law for the reasons and upon the authority submitted to the Court in plaintiff's memorandum, which is incorporated herein by this reference.

BOYLE, BILBY, THOMPSON & SHOENHAIR,

/s/ RICHARD B. EVANS,

/s/ WILBERT E. DOLPH, JR.,
Attorneys for Plaintiff.

Affidavit of mail attached.

Lodged April 3, 1958.

[Endorsed]: Filed June 10, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following Findings of Fact and Conclusions of Law:

I.

Plaintiff is a citizen and resident of the State of California and defendants are residents and citizens of the State of Arizona. The amount in controversy between the parties in this action exceeds the sum of $3,000.00, exclusive of interest and costs.

II.

On or about September 21, 1956, plaintiff and defendants entered into a Lease and Option to Purchase agreement (Exhibit 3 in evidence) wherein defendants leased to plaintiff certain unpatented mining claims in Pima County, Arizona. The agreement provided for the payment by plaintiff to defendants of $1,000.00 per month rent, plus a quarterly rental payment of $7,000.00. The agreement provided further that any legal expense paid by plaintiff incident to clearing title to the leased premises should be deducted from rental payments thereafter becoming due to defendants, prorated over one year's payments as the same became due. The agreement provided further that plaintiff might terminate the same after the payment of the first quarterly payment of $7,000.00, by giving to defendants notice in writing of termination, accom-

panied by an executed and acknowledged quitclaim deed to the leased premises.

III.

When the parties entered into the Lease and Option agreement, it was their intention that plaintiff could not terminate the agreement before, nor until, he had made payment of the first quarterly payment of $7,000.00; and it was their intention at that time, also, that plaintiff could not terminate the lease before, nor until, he executed and delivered to defendants a quitclaim deed duly acknowledged, releasing and quitclaiming to defendants the demised premises.

IV.

On or about November 5, 1956, plaintiff mailed to defendants a letter stating that plaintiff was reluctantly forced to surrender the Lease and Option, stating that the $7,000.00 payment due November 8, 1956, would be paid when due, and stating, further, that the quitclaim deed provided for in the agreement would be sent to defendants as soon as practicable. The letter was received by defendants in due course of the mail.

V.

On or about November 6, 1956, plaintiff by and through his agent mailed to defendants a check for $1,000.00 representing the regular monthly rental payment and a check for $3,932.15 representing the first quarterly rental payment of $7,000.00 less amounts claimed by plaintiff to be deductible under

the agreement as legal expense incident to clearing title to the demised premises. The amounts which plaintiff had theretofore expended for clearing title were: $4,000.00 paid in settlement of an action to quiet title to the demised premises, and $601.77 paid on account of attorney's fees and costs in the quiet title action.

VI.

On or about November 16, 1956, defendant Mr. Albert telephoned plaintiff in San Francisco requesting copies of the logs of the five holes drilled by plaintiff on the leased premises. In that conversation Mr. Albert expressed dissatisfaction over the remittance made by plaintiff on or about November 6th, stating that he believed defendants had been underpaid. At that time, plaintiff agreed to send the drilling logs as requested and explained that the adjustment of the difference between the parties as to money matters would be placed in the hands of plaintiff's attorneys. Plaintiff promptly sent to defendants the drilling logs requested.

VII.

When defendants received plaintiff's letter of November 5, 1956 (Finding No. IV), they understood that the Lease and Option agreement required plaintiff to make the $7,000.00 payment and to execute and deliver a quitclaim deed of the leased premises before he could terminate the agreement; and they knew that plaintiff was attempting to, and claiming the right to, terminate the Lease and Option without first making the payment and without first

delivering the quitclaim deed. At that time, and thereafter until some date subsequent to January 1, 1957, although disputing with plaintiff the amount of money due to them as accrued rentals, defendants acquiesced in the termination of the Lease and Option agreement notwithstanding plaintiff had failed to make the $7,000.00 payment and to deliver the quitclaim deed. About November 16, 1956, defendants recognized that plaintiff's interest in the demised premises was ended and defendant Mr. Albert requested and received from plaintiff the drilling logs pertaining to the demised premises. Defendants did not at any time prior to April 16, 1957, give notice to plaintiff or make claim to him that the Lease and Option agreement was not and would not be terminated until the $7,000.00 payment was made and the quitclaim deed delivered.

VIII.

On or about November 21, 1956, defendants, through their attorney, mailed to the plaintiff, through his attorney, a letter asserting that the payment of $3,932.15 was not proper and that plaintiff was still indebted to the defendants on account of the first quarterly payment.

IX.

On or about November 26, 1956, plaintiff, through his attorney, responded to defendants' letter of November 21 disagreeing with the position of the defendants and stating that the defendants would be

hearing from San Francisco either direct or through the office of plaintiff's attorney.

X.

On or about January 4, 1957, plaintiff, through his agents, mailed to defendants a check in the sum of $1,286.52 representing an additional payment on account of the first quarterly payment of $7,000.00 accompanied by a letter stating that the remittance of $3,932.15 which was made November 6, 1956, had been the result of an error in computation.

XI.

Neither the check for $1,286.52 nor the check for $3,932.15 were negotiated by the defendants until after the institution of this litigation.

XII.

On or about May 31, 1957, plaintiff, through his attorney, mailed to defendants a letter enclosing a quitclaim deed duly executed and acknowledged. Said letter and deed were received by defendants in due course of the mail. On or about May 31, plaintiff deposited the sum of $23,000.00 in escrow in the Tucson Downtown Office of the Valley National Bank of Phoenix pursuant to the provisions of paragraph 14 of the Lease and Option agreement.

XIII.

At no time prior to May 31, 1957, did the plaintiff deliver or tender a quitclaim deed to the premises to the defendants.

XIV.

The total amount paid by plaintiff to defendants under the Lease and Option agreement and on account of the quarterly payment of $7,000.00 due November 8, 1956, is the sum of $5,218.67.

XV.

The failure to deliver the quitclaim deed to the defendants promptly after November 6, 1956, was occasioned by the oversight of John W. Hamilton, secretary of Homestake Mining Company, or of some other officer or agent of the Homestake Mining Company, and the said John W. Hamilton or such other officer or agent of the Homestake Mining Company in such oversight, were acting as the agents of the plaintiff within the scope of their authority.

XVI.

The failure to make proper remittance in connection with the $7,000.00 quarterly payment was occasioned by a dispute between the parties as to what portion of said payment was properly offset by expenditures made by plaintiff in clearing title to the demised premises and as to the proper proration period of such expenditures.

Conclusions of Law

I.

This Court has jurisdiction of the parties and of the subject matter of this action.

II.

The payment of the first quarterly payment of $7,000.00 was a condition precedent to the exercise by the plaintiff of his option to terminate the contract.

III.

The sum of $4,000.00 paid on behalf of the plaintiff to compromise the quiet title action was not a legal expense within the meaning of the contract.

IV.

The execution, acknowledgment, and delivery to the defendants of a quitclaim deed, releasing the property described in the contract to the defendants, was a condition precedent to the exercise by the plaintiff of his option to terminate the contract.

V.

Defendants waived performance by plaintiff of the conditions precedent to plaintiff's right to terminate (being the conditions described in Conclusions of Law I and III) and the Lease and Option agreement was terminated upon such waiver and on or about November 16, 1956.

VI.

Notwithstanding the termination of the Lease and Option, plaintiff was bound to pay the $7,000.00 quarterly payment which fell due on November 8, 1956, and deliver the quitclaim deed to the demised premises.

VII.

A quitclaim deed satisfying the requirements of the Lease and Option agreement was delivered to and accepted by defendants on or about May 31, 1957.

VIII.

Following the payments of $3,932.15 and $1,286.52 made by plaintiff to defendants on November 6, 1956, and January 4, 1957, respectively, there remained due from plaintiff to defendants on account of the first quarterly $7,000.00 payment, a balance of $1,330.00.

IX.

Defendants are entitled to judgment against plaintiff on Count 1 of their Amended Counterclaim in the following amounts:

(a) Interest at the rate of 6% per annum on the sum of $2,616.52 from November 8, 1956, to January 8, 1957.

(b) The sum of $1,330.00, together with interest thereon at the rate of 6% per annum from January 8, 1957, until paid.

X.

Defendants are entitled to recover their costs of suit from plaintiff.

Dated: June 10, 1958.

/s/ JAMES A. WALSH,
United States District Judge.

[Endorsed]: Filed June 10, 1958.

In the District Court of the United States
for the District of Arizona

Civil Action No. 964—Tucson

IRA B. JORALEMON,

Plaintiff,

vs.

H. GREENWAY ALBERT and MAJA GREENWAY ALBERT, Husband and Wife,

Defendants.

JUDGMENT

The above-entitled action having regularly come on for hearing before the Court without a jury on February 21, 1958, the plaintiff appearing by his attorneys, Boyle, Bilby, Thompson & Shoenhair, and the defendants appearing by their attorneys, McCarty, Chandler & Udall, and each of the parties having introduced evidence both oral and documentary, the matter having been argued and submitted to the Court for decision, and the Court having heretofore on June 10, 1958, lodged its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. This court has jurisdiction of the parties and of the subject matter of this action.

2. The lease and option between the parties, referred to in plaintiff's complaint, was terminated prior to December, 1956.

3. Judgment in favor of the defendants and against the plaintiff on Count I of defendants' amended counterclaim is hereby awarded in the following amounts:

(a) Interest at the rate of 6% per annum on the sum of $2,616.52 from November 8, 1956, to January 8, 1957.

(b) The sum of $1,330.00, together with interest thereon at the rate of 6% per annum from January 8, 1957, until paid.

(c) Defendants' costs incurred in this action in the amount of $58.00.

4. Plaintiff is entitled to all funds held in escrow at the downtown office of The Valley National Bank of Phoenix, a national banking association, at Tucson, Arizona, under the escrow alleged in plaintiff's complaint after the amount of said judgment in favor of defendants has been paid into court.

5. Defendants have no rights against the plaintiff under said lease and option except as set forth in paragraph 3 above.

6. The Clerk of this Court is hereby ordered to issue an order authorizing The Valley National Bank of Phoenix to release and deliver to Boyle, Bilby, Thompson & Shoenhair, attorneys for plaintiff, all funds remaining in said escrow at such time as a sum equal to the aggregate amount of the judgment rendered in favor of defendants in paragraph 3 above has been deposited with said Clerk.

Done in Open Court this 18th day of June, 1958.

/s/ JAMES A. WALSH,
United States District Judge.

The foregoing Judgment approved as to form this 18th day of June, 1958.

McCARTY, CHANDLER & UDALL,

By /s/ D. B. UDALL,
Attorneys for Defendants.

[Endorsed]: Filed June 18, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that H. Greenway Albert and Maja Greenway Albert, Defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 18th day of June, 1958.

Dated this 18th day of July, 1958.

McCARTY, CHANDLER & UDALL,

By /s/ CHARLES D. McCARTY,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 18, 1958.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That the undersigned, The Fidelity and Casualty Company of New York, a corporation of the state of New York, duly licensed to transact a general surety business in the state of Arizona, is held and firmly bound unto the above-named Plaintiff in the sum of Two Hundred Fifty and No/100 ($250.00) Dollars.

The condition of this obligation is such:

That Whereas the above-named Defendants have appealed to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in the above matter on the 18th day of June, 1958.

Now, Therefore, if the said Defendants shall pay the costs of the Plaintiff if the appeal is dismissed or the Judgment affirmed, or shall pay such costs as the Appellate Court may award if the Judgment is modified, this obligation shall be null and void, otherwise to remain in full force and effect.

Dated this 18th day of July, 1958.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,

[Seal] By /s/ TRACY BIRD,
Attorney.

[Endorsed]: Filed July 18, 1958.

In the United States District Court
for the District of Arizona

Civ. 964—Tucson

IRA B. JORALEMON,

Plaintiff,

vs.

H. GREENWAY ALBERT, et ux.,

Defendant.

PRETRIAL CONFERENCE

Appearances:

For the Plaintiff:
MESSRS. BOYLE, BILBY, THOMPSON & SHOENHAIR, by
MR. WILBERT E. DOLPH, JR.

For the Defendant:
MESSRS. McCARTY, CHANDLER & UDALL, by
CHARLES D. McCARTY.

The Above-Entitled Matter came up for pretrial hearing on the 4th day of October, 1957, before the Honorable James A. Walsh, Judge, and the following proceedings were had, to wit:

Mr. McCarty: I can generally go over the problem. Mr. Joralemon came to town for his deposition on Monday of this week or was it Tuesday?

Mr. Dolph: It was Tuesday.

Mr. McCarty: I asked him to show and so he

came to town on Tuesday. In the contract that was prepared by them there was a provision in there, and I will see if I can find it in this draft of the contract.

Mr. Dolph: Well, tell him generally what it is.

Mr. McCarty: It provided that they intend to do certain exploration on these claims that are owned by the defendant. They envisioned drilling on the property and the provision was made in the contract that no casing would be pulled until they had paid to the defendant five thousand dollars. Monday evening of this week—my client went out there over the week end and he came to me with the information that there was something irregular about the casing out there, and on Tuesday, Mr. Joralemon informed me that without their knowledge the contractor which they had employed to drill the holes had pulled some casing and substituted pipe. Now, I learned that on Tuesday evening of this week. From Mr. Joralemon, I heard it for the first time. I heard that something was irregular on Monday evening from my client. I have made agreements to employ an engineer to go out and see if he can—I don't know anything about what you can determine, I haven't any idea of what it does to a drill hole and to pull the casing and substitute pipe, but I do know that our rights in that regard—I don't know what to do about it, but there are two witnesses here and that is why I took it up with them when they were here Tuesday. Mr. Joralemon was here and Mr. [3*] Lipscomb was

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

here, and I told them until I knew or had reasonable knowledge of what had been done out there that I might be in a position of suggesting to the Court that we continue the trial date on it.

Mr. Dolph: Now, may I be heard on this particular thing? First of all, I think Charlie raised the question or there is a provision in the contract relating to casing being left in the hole. I don't believe it reads exactly the way he stated and we don't have the contract here, and we believe there wasn't even a technical violation, but we can argue that later. The point we make is this, that we learned of it after Charlie heard of it, actually, and we do not want a continuance. We do not think it is a type of thing that a continuance should be granted on and the defendant himself has had an opportunity to go out there and inspect these premises a long time ago and his deposition will show that he realized that we weren't going to continue on this thing and he knew we had abandoned the property and we don't feel it is fair to us. We had made agreements to get these people down when the trial had been set. We have got money on deposit in escrow and it is tied up pending the outcome of this lawsuit. We feel that it is unfair to require us to postpone this thing and continue just because the defendant himself has maybe slipped on his rights. Besides, we don't think it requires any additional time to prepare. Anything that they want to prepare in the way of evidence we think can be adequately done between now and the time for the trial to start. The engineer or the driller who did

the drilling has all the facts available and is here in town and he is available to Mr. McCarty the same as he is to us. We feel that if we are prepared to go on that issue then he certainly is, too. [4]

Mr. McCarty: Lest there be any doubt, the contract provided that no casings will be pulled until they pay him twenty-five thousand dollars, is that right?

Mr. Dolph: I don't believe that is the wording of the contract. There is an issue on when that casing should be pulled out.

Mr. McCarty: What do you think is in the contract?

Mr. Dolph: It doesn't matter what I think. The contract will speak for itself. I am just telling you right now that we are going to contend that there wasn't any violation of the contract because there was pipe substituted for a portion of the casing.

Mr. McCarty: The casing was pulled, there is no doubt about that.

Mr. Dolph: There is some casing pulled out. There is some casing in the bottom of each hole.

Mr. McCarty: In other words, you don't expect people to do something that they are bound by contract to do. Their contract was that no casing would be pulled and it was by accident that I found out about it and I found out about it when my client took somebody out there to show him the claims and noticed the irregularity in the drill hole and called it to my attention on Monday.

Mr. Dolph: Your client was out there in March, or at least was trying to sell the claim in March of

this year, and according to his testimony he found it out merely by going up to the hole and shaking the pipe. It was apparent if he went out there. We didn't know about it either. The driller did it.

Mr. McCarty: Be that as it may, I don't know that he is violating [5] the duty when he assumes that people have obeyed the word of the contract that he signed. I am telling the Court when I found out about it and I know when you found out about it, because you found out at the very time we did or before.

Mr. Dolph: I found out about it the day of the deposition.

Mr. McCarty: My client came in and said, "That casing they left out there is"——

The Court: Of course, as far as when he should or shouldn't, that wouldn't enter into it as long as it wasn't barred by limitations.

Mr. Dolph: We don't object to his amending.

Mr. McCarty: It is justified in this matter.

The Court: That is what I am getting at. If you amended your counterclaim to include that and we separate those issues——

Mr. McCarty: That would be all right with me.

The Court: Is that agreeable with you, Bill?

Mr. Dolph: We would prefer to try them all the 10th, but if you insist, we would rather get this one issue determined now.

The Court: I am just assuming that Charlie would come in here with a formal motion and set up and verify the things that he has told me here, that he didn't discover this until very recently and

he doesn't want to be cut out of it. Now, if that could be agreed upon, you could amend your counterclaim and you could—that part of the case would be separately tried and we would go ahead with what we have got and then you could answer the second amended counterclaim and we could try that another day.

Mr. Dolph: I do not want to be in the position of consenting to [6] that, your Honor. I think that is within the Court's discretion. Our clients, I am sure, would prefer the whole thing be tried at once because they are going to be down there for the trial, but if it comes to an alternative between what you suggest and continuing the whole trial, we certainly want to try our lawsuit on the date that it has been set.

The Court: I would only say this, Bill, that assuming I granted a continuance, but assuming that Mr. McCarty had presented a motion supported by evidence that set out that and there was nothing to the contrary appearing—in other words, I would undoubtedly grant the continuance rather than have him lose the cause of action.

Mr. Dolph: Well, your Honor, would he lose the cause of action if you granted him leave to appeal?

The Court: Well, he tells me that he can't, says he is not prepared to try that because he doesn't really know what evidence he would have or can get as to it.

Mr. Dolph: Whether he has been damaged and, if so, how much?

Mr. McCarty: Now, how do I find out if there is a drill casing five hundred feet under the ground?

Mr. Dolph: You have got the same man available that we have.

Mr. McCarty: I will find him.

Mr. Dolph: He has been instructed by our people to disclose any information you want, Mr. Dodge.

Mr. McCarty: I will talk to him. There were two drillers, though, you remember.

Mr. Dolph: They were partners. [7]

Mr. McCarty: No; there were two drilling companies.

Mr. Dolph: I am not aware of that.

Mr. McCarty: That is perfectly satisfactory with me. As far as being prepared on this case, I am as prepared now as I will ever be, but you can appreciate the position I am in if on Monday of this week I find out that a very substantial right of my clients arises that involves this case. Do you want me to file an affidavit or I can make a motion here in open court for leave to amend my client's claim to allege a breach of contract with respect to pulling the casing and the Court may order a separate trial on that count of the counterclaim which may not come to trial if my discovery indicates that I don't have a counterclaim. But at least I ought to be able to—how about that procedure?

Mr. Dolph: You are moving?

Mr. McCarty: Well, I believe it is proper to move at this time and I now move the Court for leave to amend my counterclaim to insert a counter-

claim alleging that they—and I indicate my consent to the Court ordering that count of the counterclaim separate for trial.

Mr. Dolph: Well, I do not object to the amendment to the counterclaim, your Honor, but do object to the severance from trial. I haven't discussed that with my client. It is possible that I could consent to that if I had such an opportunity. I am not opposing this on the grounds there has been no affidavit, which I think Mr. McCarty's statements can take the place of.

The Court: In other words, you are not making any resistance on the basis that it is not done [8] formally?

Mr. Dolph: No.

The Court: Well, I will grant the motion for leave to file an amended counterclaim setting up the additional count and relying upon counsel's statement, which incidentally is not questioned as to when discovered by counsel and his client.

Mr. Dolph: By counsel, no. I would dispute them when the client discovered it but that is neither here nor there.

Mr. McCarty: Let me ease your mind, Mr. Dolph. Mr. Albert Tully came to my office Monday morning to inform me of the fact.

Mr. Dolph: I said I don't dispute when counsel discovered it. I am not arguing with you on that.

The Court: On the basis of that, because I feel that that would hardly give counsel adequate time to prepare his claim on it, I guess in the first place he doesn't know whether he has been damaged and

in the second place doesn't know how much, and while he can get the engineer or the driller that you mentioned, even then I don't know that he would be required to take that driller's word as to what is down there after he hears from him. I don't know that I could or you could, Mr. Dolph, or anybody else could say that they were ready to go to trial on a matter of that kind, so on that basis I will separate the issues made by the second count of the counterclaim and we will try that at another time.

Mr. Dolph: Your Honor, will you leave that open so that I will have an opportunity to contact my client to see whether they prefer to go ahead under those circumstances, whether they would prefer to go to trial on the present issues separately from those which will be raised by the [9] amendment or whether they would want to have the whole thing go over.

The Court: I will say right now that in the event they should decide to try the whole thing at once, I will unhesitatingly continue it.

Mr. McCarty: I would certainly have no objection on that regard.

The Court: I am putting you to two trials in view of the circumstances of the counterclaim here and if you wanted to insist on it, I couldn't require you to try it twice.

Mr. McCarty: Could counsel indicate when you might be able to give your preference in that regard?

Mr. Dolph: It will be the first of the week I

believe before I can contact the people. They are all over the country.

The Court: What have we got in the way of exhibits that could be——

Mr. McCarty: Almost every exhibit which I have, your Honor, was identified and attached to the deposition of Mr. Joralemon and Mr. Driscoll, which were taken by Mr. Baker Tuesday afternoon.

The Court: It hasn't been filed yet so I haven't got those. Did you stipulate as to those in the deposition that they might go into evidence, or was——

Mr. Dolph: No; I don't believe we had such a stipulation and offhand there are numerous documents, correspondence and so forth and so on. I don't think we will have much difficulty on that score. The foundation on all of them had been laid, hadn't it, Charlie?

Mr. McCarty: I don't believe we have anything up there that isn't evidence and will be readily apparent to counsel that it is evidence. In other words, I certainly wouldn't object to any of the letters or documents [10] you provided.

Mr. Dolph: I don't think there would be general use to us to make a blanket stipulation to them.

Mr. McCarty: I will tell the Court that I anticipate very little trouble in regard to the exhibits that are now with the deposition.

The Court: Do you have any, Mr. Dolph, that you didn't——

Mr. Dolph: Not that I can think of, your Honor. Our documents are almost identical to those that Mr. McCarty put in, either the originals or the

copies. We certainly are not going to object that they are the copies rather than the originals and I am sure that he won't on the ones that we put into the deposition and I think what is in there will pretty well cover what we are going to introduce at the trial.

The Court: Well, is there anything further that we could do at this hearing?

Mr. McCarty: I could introduce some vouchers here that might facilitate these, that might be evidence and that I might want in for that purpose.

Mr. Dolph: Isn't this one of the documents in the deposition? I believe it is. I think that is one that a copy of was put in with a registered return on it.

Mr. McCarty: Do you have any objection to the introduction in evidence?

Mr. Dolph: Well, I haven't studied it thoroughly. Mr. Driscoll, I believe, wrote it. It is on his letterhead.

The Court: This antedates the agreement? [11]

Mr. McCarty: Yes.

The Court: Well, isn't the agreement the thing that your rights are determined by, rather than——

Mr. McCarty: Right. The agreement provided that they agree to pay legal expenses and court costs. The lawsuit was settled for four thousand. They paid Mr. Connor his fee and costs and the question is whether the four thousand which was paid in settlement was legal expenses and court costs. That is one of the major issues in this case.

The Court: That is in the agreement, isn't it, that provision?

Mr. McCarty: Legal expenses and court costs. And of the question of interpretation as to what the parties intended that to be.

The Court: That is an issue that may or may not come up, legal expenses and court costs. Who is contending that that term is ambiguous?

Mr. McCarty: I claim that it is unequivocal as the devil.

Mr. Dolph: We both do, as usual in those interpretive things, your Honor. They claim that the term legal expenses, I don't believe court costs is included there, legal expenses. They claim it does not cover them when settlement was made and we claim that it does.

The Court: You claim that it is not an ambiguous thing?

Mr. Dolph: That's right.

Mr. McCarty: In the light of that, if the Court should decide in the light of those that it is ambiguous and should go into instructions—I will have the letter with me.

The Court: Well, we can mark them one at a time.

Mr. McCarty: There is no objection as to the function, is that [12] right?

Mr. Dolph: Not on your avowal that it was received from Driscoll.

The Court: It may be stipulated then that what I have just marked in pencil and have circled will

be put in the file, and may be offered at the trial and subject to an objection as to being received.

Mr. Dolph: Let me be a little more specific, if I may. I would like to reserve all objections except the objection of failure to lay a foundation. I haven't studied the document thoroughly. There may be some other specific objections that I would like to make at the time it is offered.

The Court: We will say that it may be received without further foundation, in evidence.

Mr. Dolph: Right.

The Court: That will probably cover everything. Have you got any more?

Mr. McCarty: I might have one or two other things here. I don't think I have got any—I am prepared, if counsel wants to, the originals of the letters that were sent to Mr. Albert, May 31st, that haven't been put into evidence, but certainly——

Mr. Dolph: To Mr.——

Mr. McCarty: To Mr. Albert from your firm.

Mr. Dolph: Well, I was going to ask you to stipulate as to all of the exhibits that are attached to the complaint. I don't believe there is any dispute under the pleading.

Mr. McCarty: Let me see—— [13]

Mr. Dolph: I think all of those except that letter you refer——

Mr. McCarty: I will stipulate that the court may receive into evidence those exhibits. I think they are all material.

The Court: A, B, C and D.

Mr. McCarty: I think they are material. Now,

about those vouchers, do you think there is any reason to put those in evidence?

Mr. Dolph: I think it would be a good idea. It gives the whole picture on it.

Mr. McCarty: Although Mr. Driscoll, the attorney and I were able to reconstruct with fair accuracy and these are voucher stubs in connection with remittances which were made to Mr. Albert, with the Homestake Mining Company, which just complete the formal picture, so I will put them in. There is the first one. The second one is missing and I don't know where it is, but Mr. Driscoll and I, when his desposition was taken, arrived at a pretty fair surmise in that regard which the court will find in evidence.

The Court: I am going to make these two.

Mr. McCarty: This is the 4th one.

The Court: Two, three and four.

Mr. McCarty: The fifth one and then a payment which is November 6th. Now, Mr. Dolph, would you like to join in a stipulation that those may go in and those are actually the voucher stubs of remittances to the defendant from Homestake Mining Company in connection with this Joralemon contract?

Dr. Dolph: Those are the ones you talked to Driscoll about?

Mr. McCarty: Exactly: [14]

Mr. Dolph: Well, yes, I will so stipulate.

The Court: It is stipulated that the vouchers which I have marked with the penciled figures, two, three, four, five, six and seven, may be received in

evidence on the offer of either party upon the trial.

Mr. McCarty: Now, here is a document that I intended to identify at the taking of the deposition, Mr. Dolph, and I don't think you will be in any position to do anything about it here because you don't know any more about it than I know about it and I know practically nothing about it. I think it is a draft that Mr. Driscoll left with Connor on April 28th when he was in Tucson and I think that is his handwriting on this. I want you to know that I have the thing and I forgot to identify it at the taking of the deposition. It might have some value at the trial, I don't know.

Mr. Dolph. Well, if you surmise correctly, I think all the witnesses as well as the attorneys were confused by those drafts at the taking of the depositions.

Mr. McCarty: I wanted you to know that I had it but I can't ask you to do anything about it because I don't know what it is.

Mr. Dolph: You think it is a copy that Driscoll provided and left with you?

Mr. McCarty: Mr. Conner, when he was down here April 28th. I think he left it with him on that date and I intended to ask him about it, but I overlooked it.

The Court: Do you have anything, Bill?

Mr. Dolph: No, sir. I don't want to be barred if I discover something. [15]

The Court: No. This is solely for the purpose of expediting matters.

Mr. Dolph: I think that Charlie went through

everything that he had. We put a few in and I believe almost everything except these vouchers was put it.

Mr. McCarty: We tried to put in everything that could be of any major materiality.

The Court: The major advantage of this is it will be in the file and if somebody wants to go over them and they will be offered and there will be no objection as to lack of foundation and you can argue it and pass on it that way.

Mr. McCarty: As to the Court's query with respect to counsel's contract agreement being ambiguous, I don't have it here before me, but it reads legal expenses and court costs.

Mr. Dolph: I believe you will find it is just legal expenses.

Mr. McCarty: You might be right.

Mr. Dolph. I don't think it refers to court costs, maybe I am wrong.

Mr. McCarty: We will have it here.

Mr. Dolph: That is just a matter of memory. Wait a minute, I think that is quoted in the complaint, that part of it.

Mr. McCarty: Do you have any offers to make me in this case, Mr. Dolph?

Mr. Dolph: I am willing to entertain an offer of settlement. I will submit it. We can discuss that on the way up to my office if you [16] would like.

Mr. McCarty: Any real legal expense to the foregoing shall be deducted, that is what it says. Now, with respect to the leave of Court that the Court has given me to file an amended counter

claim, would Tuesday of next week be soon enough for that?

The Court: Sure, we are not going to try it anyway.

Mr. Dolph: Well, if I may interject this, I would like to know what the amendment is going to be when I call these people, if possible.

Mr. McCarty: I intend to amend and allege a breach of contract with respect to their putting in a well casing and request damages of twenty-five thousand dollars or an alternative of twenty-five thousand dollars less whatever recovery I may get in this case.

The Court: In other words, they would have a right to take it if they gave you twenty-five thousand dollars?

Mr. McCarty: What I intend to do is allege a breach of that contract and parley along those lines.

Mr. Dolph: All right. Just a breach of contract and it is limited to the matter arising from the removal of casing?

Mr. McCarty: Oh, yes.

The Court: You are going to discuss settlement or you are not.

Mr. McCarty: I don't believe it is possible to settle the case, I honestly don't.

The Court: Why do you say that?

Mr. McCarty: It is a very unusual case.

The Court: I was going to say every case is unusual. Every contract [17] case is very unusual.

Mr. McCarty: Are you at all familiar with this case?

The Court: Yes, I read it.

Mr. McCarty: Well, on December 5th they gave a notice to Mr. Albert of their intention to quit the premises and we will send you a quit claim deed when it is practicable, and I don't think your Honor read the provision of the contract which they did not quote.

The Court: I know that you in your answer said they had left it out.

Mr. McCarty: Well, the paragraph three of it says that they would surrender the property, as quoted in here. Well, the notice of November 5th was given to us in which he said, "I am going to give the place up and a quit claim deed will be provided and forwarded to you as soon as practicable." That was November 5th. November 6th came that check out of the San Francisco office for $3,832.15. Now, the agreement provided that there can be no cancellation under paragraph three until the first quarterly payment of $7,000.00 had been made. They weren't to have the cancellation until they had paid the first quarterly payment of $7,000.00. Well, when they got that check they demurred as to the amount and later in the month Charlie Conner wrote to them and said, "we think you are wrong." And we didn't hear anything from that time until about the third of January we got that supplemental check and they said, "we are sorry we computed what we owed you wrong and here is the balance." Well, we continued along until in April, Mr. Albert had Mr. Conner write and say, "why don't you send me my rent?" Then we got Mr. Bilby's letter of May 31st

in which they forwarded to us a [18] quit claim deed.

The Court: What about thirteen?

Mr. Dolph: That is a very good question.

The Court: That was the thing that registered with me when you registered it.

Mr. McCarty: That registered with me also. With respect to the notice, now, here again it is a tough question. You see the notice of November 5th, here is what it says: "I am surrendering the lease. The $7,000.00 payment will be paid when due and the quit claim deed will be sent to you." That was never done until May 31st of this year.

The Court: Thirteen says that he can give up all or part and then if he does and they want it he will give them a quit claim deed, but until they give it all up they are obligated to pay on it.

Mr. McCarty: That is correct and furthermore, they didn't have the right to cancel until they had made that $7,000.00 payment.

Mr. Dolph: I don't think we want to argue our case here. I think you are getting in a few more licks than I am.

The Court: What I am looking at is what might happen.

Mr. McCarty: That is why I say it is an enormously difficult question. What has really fouled up the works with respect to trying to settle this case is the fact this other has come up.

The Court: The pipe deal?

Mr. McCarty: Yes.

The Court: I am just thinking out loud now.

You haven't offered me anything, but if you care to, we will consider it and I think that the [19] big issue is this twenty-five thousand dollars. I don't think there is much to argue about on this and I think you will agree that once you have had a chance to talk to the drillman, but be that as it may——

Mr. McCarty: I have talked to the drillman after I talked to the mining engineer I have hired to go down there. [20]

* * *

State of Arizona,
County of Pima—ss.

I, Judy Smith, stenotypist, do hereby certify that I have transcribed to the best of my ability the stenographic notes made by Jimmy R. Galloway, a duly qualified court reporter, on the date indicated, in the above-entitled action, and that the foregoing 20 typewritten pages represent a complete transcript of said notes.

Dated this 12th day of October, 1958.

/s/ JUDY L. SMITH.

[Endorsed]: Filed October 13, 1958.

In the United States District Court
for the District of Arizona

No. Civil 964—Tucson

IRA B. JORALEMON,

Plaintiff,

vs.

H. GREENWAY ALBERT and MAJA GREENWAY ALBERT, Husband and Wife,

Defendants.

PROCEEDINGS

Appearances:

MESSRS. BOYLE, BILBY, THOMPSON & SHOENHAIR, By
MR. RALPH W. BILBY and
MR. WILBERT E. DOLPH, JR.,
For the Plaintiff.

MESSRS. McCARTY, CHANDLER & UDALL, By
MR. CHARLES McCARTY, and
MESSRS, GATEWOOD & GREENWAY, By
MR. CHARLES C. GATEWOOD,
For the Defendants.

The Above-Entitled Matter came up for trial on the 21st day of February, 1958, at the hour of 10:00 o'clock a.m., at Tucson, Arizona, before The Honorable James A. Walsh, Judge, and the following proceedings were had, to wit:

Mr. McCarty: I wonder if the record could show the association of Mr. Charles Gatewood as attorney for the plaintiff in the case?

The Court: The record may so show. Are you gentlemen ready?

Mr. Dolph: Plaintiff is ready, your Honor.

Mr. McCarty: Defendants are ready, your Honor.

The Court: You may proceed.

Mr. Dolph: Before we get into the merits of the case, your Honor, there are a couple of preliminary matters I think we can take care of by stipulation. Number one, Mr. McCarty has agreed that Count Two of his amended counterclaim can be stricken.

Mr. McCarty: That is the agreement, your Honor. I told Mr. Dolph it would not be necessary for him to prepare a defense to it and the fact upon which it was based proved to be incorrect.

The Court: Very well. There will be an order on stipulation of counsel striking Count Two of the amended counterclaim.

Mr. Dolph: Mr. McCarty, we can save a lot of time if we stipulate to the facts you admit in your pleadings. Are you willing to do that?

Mr. McCarty: You tell me the facts you want me to stipulate to, Mr. Dolph, and I will be glad to state my position. [6*]

Mr. Dolph: The allegations contained in paragraphs one and two of our complaint and the allegations contained in paragraph three of our

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

complaint, and the allegations contained in paragraph four of our complaint, except as limited in paragraph three of your answer.

Mr. McCarty: The complaint does not state a claim upon which relief can be granted. The Court is without jurisdiction in the premises, and I think we had better cure that by stipulation right now. The Court has no jurisdiction under paragraph one.

Mr. Dolph: Do you have a motion to present?

Mr. McCarty: No, I don't have a motion to present. I am calling the Court's attention to the fact he has no jurisdiction in the case.

Mr. Dolph: There is diversity of citizenship.

Mr. McCarty: It is not alleged.

The Court: There is no allegation it is a citizenship, is what Mr. McCarty is referring to.

Mr. Dolph: I will move at this time to amend the allegations of paragraph one to read: That plaintiff is a resident and citizen of San Francisco, California, and that the defendants are each residents and citizens of the State of Arizona.

Mr. McCarty: I have no objection to the amendment as presented, your Honor, and at this time I will admit for the record the truth of those allegations.

The Court: If I may borrow your pen, Miss Clerk, I will interline the amendment.

Mr. McCarty: I have admitted paragraphs two and three in my answer.

Mr. Dolph: Yes.

Mr. McCarty: I continue to admit them.

Mr. Dolph: In paragraph three you admit, ex-

cept there are other allegations, which is not a denial.

Mr. McCarty: I stated already that I admitted three, Mr. Dolph.

Mr. Dolph: And the allegations contained in paragraph three, the express admissions contained in paragraph three of your answer.

As to the institution and settlement of a quiet title action and payment of the sum of $601.77.

Mr. McCarty: I admit that.

Mr. Dolph: As attorneys' fees and costs and payment of $4,000 in settlement of the claim by the plaintiff.

Mr. McCarty: All that has been admitted.

Mr. Dolph: And those were done with the consent and approval of the defendants?

Mr. McCarty: Right.

Mr. Dolph: Then you have admitted the allegations of paragraphs five and six? [8]

Mr. McCarty: Yes, sir. One other point that I wanted to make clear—I think the pleadings makes it clear—your request I admit that that was done with the approval, that payment of the $4,000, with the approval of the defendants, that is the qualified approval along the lines set forth in my paragraph three.

Mr. Dolph: If this is to be limited to a stipulation, you will not stipulate that it was done with approval and consent without any condition?

Mr. McCarty: No, I will insist upon the condition stated in my pleadings, the approval was a qualified approval.

Mr. Dolph: We will stipulate on that. We will go ahead with our proof on that item. You do stipulate those amounts were paid and the lawsuit was instituted on the defect of title referred to in paragraph seven of the lease and option?

Mr. McCarty: I don't know the paragraph; I will certainly stipulate that the lawsuit was instituted, the quiet title action was instituted, that the attorneys' fees in the amount you stated were paid, that the lawsuit was settled on the payment of the amount of $4,000 and that amount was actually paid, yes.

Mr. Dolph: By the plaintiff?

Mr. McCarty: By the plaintiff or by Homestake Mining Company, if you want to be real accurate about it. [9]

Mr. Dolph: On behalf of the plaintiff.

Mr. McCarty: All right.

Mr. Dolph: The allegations of paragraph five you admit; in that connection I think we should call the Court's attention to a minor discrepancy as to the amount paid after November 5th, 1956. There is an error in my allegation, the second part of the complaint, and I ask to amend that to read: Subsequent to November 5th, 1956, the plaintiff paid to defendants the sum of $6,218.67. I believe your vouchers——

Mr. McCarty: Subsequent to what date?

Mr. Dolph: November 5th.

Mr. McCarty: And they paid what amount?

Mr. Dolph: $6,218.67.

Mr. McCarty: I don't arrive at that result. My

mathematics is bad. I have no objection to that amendment. For clarity in the matter I think it might be well to point out to the Court that the sum of $5,218.67 was paid on account of the requirement of the contract requiring payment of the $7,000 payment. In addition there was a regular monthly payment of $1,000, making a total of $6,218.67.

Mr. Dolph: I think that is substantially correct. In other words, the $5,218.67 was paid in connection with the quarterly payment.

Mr. McCarty: The $7,000 payment referred to in the contract.

Mr. Dolph: Right. Can we so stipulate?

Mr. McCarty: I do so stipulate.

Mr. Dolph: You admit the allegations of paragraph six of our complaint. Can that amendment be granted, your Honor, on stipulation?

The Court: Yes, and I have made it by interlineation.

Mr. McCarty: In connection with my admission of your paragraph six, I will admit that the letter was mailed and I will admit that the letter was received shortly after the date it was mailed. I am without knowledge or information sufficient to form a belief as to whether or not it was either registered or certified. I believe it was neither.

Mr. Dolph: We can stipulate to what you say you will admit.

Mr. McCarty: I will admit the letter was mailed on that date and was received in due course of the mail shortly thereafter.

Mr. Dolph: All right. You admit the allegations contained in paragraphs ten and eleven of our complaint; are you willing to stipulate to those facts?

Mr. McCarty: I, of course, don't know it to be the fact you deposited $23,000 over there.

Mr. Dolph: I will avow to that.

Mr. McCarty: I will admit you did then. I assumed you had when you said you had, that is why I admitted it, and I now admit it. And the facts contained in paragraph eleven.

Mr. Dolph: Ten and eleven.

Mr. McCarty: Yes, they are admitted.

Mr. Dolph: I would like to call Mr. Joralemon.

Mr. McCarty: Just one moment. I believe I would like to make an opening statement. I believe it will be of some assistance to the Court if we try to cull out now what the issues are in the case, what the proof is going to be and what I take to be the legal questions involved. I think it will greatly facilitate the presentation of the matter.

The Court: For orderly purpose and orderly procedure, do you desire to make a statement, Mr. Dolph?

Mr. Dolph: I hadn't intended to, but it is perfectly all right with me if you feel it will facilitate matters, we will be happy to tell you what our position is.

The Court: I think it probably would be in this instance.

Mr. Dolph: All right. We propose to prove to the Court that the plaintiff and defendants entered

into three agreements from time to time covering the same mining claims, which are the subject of this lawsuit, one of the agreements being dated March 21st, 1956, a supplement to that on May 16, 1956, and a final agreement, the one referred to in our complaint, during September, the latter part of September, 1956. That all of the payments called for under either and all of these agreements were made up to and including November 5th of 1956. That prior to that end prior to the execution of this final agreement, there was a quiet title action instituted by Mr. Conner to quiet title to the mining claims that are covered by those agreements and which are the defects referred to in the agreement, which are acknowledged as being there and which are taken account of in the agreement. The defendants in that lawsuit were a Mr. and Mrs. White and Uranium Corporation of America. That Mr. Conner did institute the lawsuit in the names of the Alberts, that his attorney's fees and court costs were paid for by Mr. Joralemon or on his behalf; that the lawsuit was settled and a quitclaim deed or release obtained from the defendants in that quiet title action, dated September 5th of 1956. That thereafter, in accordance with the contract, the plaintiff did pay to the Alberts the sum of $1,000 a month to and including November 6th of 1956. That in connection with the quarterly payment which is referred to in the agreement, which is called for to be made on or before November 8th of 1956, in the amount of $7,000, that the agreement

provided that the plaintiff was entitled to deduct from that payment a proportionate amount of the legal expenses, as the term is used in the contract, in connection with this quiet title action. That the plaintiff did deduct what he construed to be legal expenses, including the $4,000 which was paid in settlement of the lawsuit, and that a check in the amount of $3,932.15 was sent to the defendants on November 6th as payment of that. Subsequent to that the items were recomputed and the fractions used were determined to be wrong by the plaintiff's bookkeepers and an additional check in the amount of $1,286.52 was sent to the defendants on December 31st of 1956, making a total of $5,218.67 paid under that $7,000 provision.

We propose to prove that on or about—it has been stipulated, as a matter of fact, that Mr. Joralemon mailed to Mrs. Albert a letter on November 5th, which will be marked in evidence, stating that he was not able to discover anything that warranted him to go further and that he had to reluctantly withdraw from the lease and option, that he would send the payments required under the contract and that the quitclaim deeds to the mining claims would be forthcoming as soon as practicable. That during the time Mr. Joralemon was in the mining claims he did extensive exploration work to the tune of approximately $13,000, drilled five holes, and that on November 5th or immediately prior to that date he did withdraw from the mining property and never has returned to it. That Mr. Albert never at anytime, himself

or his wife nor any agent of theirs, made any demand or request upon the plaintiff for a quitclaim deed or release to these mining claims until April 16th of 1957, at which time he had his attorney, Mr. Conner, write to them advising them that the Alberts took the position that the lease and option had not been terminated and the rentals required thereunder had been accumulating all that time. That in the interim there had been telephone conversations between Mr. Albert and Mr. Joralemon and there had been correspondence from Mr. Conner to Mr. Joralemon, that at none of these times was it ever indicated to Mr. Joralemon or to any agent of his that the Alberts took the position that the lease had not been terminated. The indication being at that time that the only dispute between the parties was how much should have been deducted properly from the $7,000 payment required to be made on November 8th. We expect to prove to you that had Mr. Joralemon had any such indication that he would have immediately furnished anything that the defendants had requested to enable them to clear their title of any claim he had under this lease and option agreement.

That is our case, your Honor.

Mr. McCarty: Your Honor, I believe that the case will boil down to two or three very simple legal issues and I would like to make a brief opening statement of the facts as I think they will bear on the only legal issues I can find in the case. Will it be all right if I jot down a few dates on the

blackboard, your Honor, to help my thinking on these things?

After some preliminary negotiations Mr. Joralemon came [15] to Tucson, Arizona, and on March 21, 1956, a penciled suggested terms of option were drawn between Mr. Joralemon on the one hand and the Alberts on the other and was signed by the parties, suggested terms of option.

The Court: Pardon me, Mr. McCarty. Is there any objection to counsel using the blackboard?

Mr. Dolph: No, your Honor.

The Court: The reason I asked, we have had trouble with that in personal injury cases, some people want to use it in opening statements to the jury and I usually rule against it, but I don't want someone to say hereafter: Well, you permitted heretofore—by stipulation, of course——

Mr. Bilby: Whatever suits your Honor's convenience.

The Court: It is all right with me, but I don't want to be misunderstood on it in the next personal injury case.

Mr. Dolph: We will stipulate, your Honor.

The Court: All right.

Mr. McCarty: On the same day that that was done, Mr. Joralemon contacted his lawyers in Tucson, Arizona, to the end that they start to work on the title to the property. Mr. Bilby's firm was contacted on that day to start the work on the title situation, and in a matter of a few days it became apparent there was a substantial cloud on the title by virtue of the claims of what we will call the

Uranium Company, it was a Utah outfit, Uranium Corporation of America, had a prior lease bond that was a substantial cloud on the title. That became apparent shortly after this was done, or about that same time. So there began a series of correspondence about how was the title to the land, and so forth, but the upshot of the whole thing was that Mr. Driscoll, who is a member of the firm—to help the Court, I will first point out that this deal was made on the following basis: Mr. Joralemon is a consulting mining engineer who has many clients. He knew about the property and it is his business to interest his clients in the property and he interested a company known as Homestake Mining Company in the property and they entered into it on a deal whereby ten per cent of the deal belonged to Mr. Joralemon, ninety per cent of the deal belonged to Homestake Mining Company. That Mining Company maintains a firm of attorneys, who I understand to be their general counsel, in Lead, South Dakota, and Mr. Driscoll is a member of that firm. At any rate, Mr. Driscoll came to Tucson, Arizona, April 28 of 1956, and he had discussions with Mr. Conner, who was Mr. Albert's attorney at that time, with reference to the deal, the cloud on the title and so forth. He presented Mr. Conner with a long formal contract on that date, telling him, "I want you to look this over and tell me what you think about it." And then he, Mr. Driscoll, went back to his hotel room that Saturday afternoon, the 28th of April, and in his hotel room he wrote out in handwriting the suggested

terms of a memorandum agreement modifying this former agreement, chiefly because of the cloud on the title, I believe. That pencilled memorandum of his, together with a pencilled letter, he mailed to Charlie Conner that afternoon in Tucson. He wrote it down at the Pioneer Hotel. That is the first signed agreement; then April 28th of 1956 Mr. Driscoll wrote this suggested amendment. Mr. Conner went to work on the suggested amendment and drew up a memorandum agreement, which was signed by Mr. Albert May 16th in Tucson, Arizona. That is the second signed agreement. May 16th it was signed by the Alberts in Tucson, Arizona, and on the same day the signed copies, according to Mr. Driscoll's instructions, were mailed to Mr. Joralemon in San Francisco, and on the same date a copy of it was mailed to Mr. Driscoll in Lead, South Dakota. That was May 16th of 1956. From that time on the total correspondence between the people was with reference with getting rid of the cloud on the title. Mr. Conner, incidentally, had in his hand a thousand dollars which had been left with him by Mr. Joralemon to pay to Mr. Albert as soon as this thing had been signed; and this thing was signed by Mr. Joralemon two or three days later, and on that date he told Conner he could release the thousand dollars and that was done. From then on we have mostly correspondence dealing with the title. Quiet title action was instituted in June of 1956. This agreement, which will be in evidence to the Court, provided the legal expenses would be paid by Mr. Joralemon, but they would be subject to

reimbursement by Mr. Albert under the language which is in the contract—I haven't memorized it, but there is a provision made for the reimbursement of legal expenses which Mr. Joralemon would pay in that connection, it being agreed he would pay that expense. The suit was instituted in June and it was answered and it was sometime along about the middle of August that Mr. Conner got a call from Mr. Driscoll, or they got to talking somehow, and Mr. Driscoll indicated that they were quite anxious to get that cloud cleared up if they could, and did he, Conner, believe there was any way of settling the thing. And he, Conner, believed that there was a possibility and he called Danzey, who was an attorney in Salt Lake City representing Uranium. And he said, "We will take $10,000." And I think that Homestake had indicated they might be willing to come up with five and there was a day or two there where there were extensive conversations, finally getting together on a price of $4,000 to settle. It was settled in the middle of August and a check from Homestake Mining Company, Lead, South Dakota office, in the sum of $4,000 was mailed to the order of Conner & Jones August 17th. That check was dated that day payable to the order of Conner & Jones for $4,000. There is the first legal question that the evidence is going to have to bear on, as to whether or not there is any [19] ambiguity in the contract as to whether or not $4,000 was legal expense, within the meaning of the contract.

The Court: What is your position on it?

Mr. McCarty: I take the position on all the reported cases that it is not. There is no ambiguity and it is not legal expense.

The Court: What is your position as to whether it is ambiguous, Mr. Dolph?

Mr. Dolph: Whether it is ambiguous, we do not think it is ambiguous.

The Court: Your position is it is legal expense under the contract?

Mr. Dolph: Yes, sir.

The Court: And reimbursable. And your position is it is not legal expense?

Mr. McCarty: It is not legal expense.

The Court: All right.

Mr. McCarty: Depending upon the Court's disposition to permit parol evidence on the deal, depending upon what your Honor's feeling on parol evidence on that point in the case.

The Court: There is no basis for it now, you have both agreed that it is not ambiguous, it is a matter of interpretation.

Mr. McCarty: I can now set forth to the Court what I will bring in by way of evidence if the Court elects to hear parol evidence on it.

The Court: No, there is no argument.

Mr. McCarty: The Court is not interested in parol evidence on that point?

The Court: Not on that.

Mr. McCarty: All right, sir. At any rate, that $4,000 payment was sent down here. The closing papers were prepared by Conner, forwarded to a

bank for escrow August 30th, about thirteen days later. The case was actually settled early in September, and on September the 18th, Conner and Jones sent to Homestake their final statement for expenses and attorneys' fees. September the 18th the whole thing was gone, settled and even billed out the attorneys, September 18th. And in Conner's letter of September 18th to Mr. Driscoll sending his bill for having disposed of the matter, he said Mr. Albert is very anxious to get this deal signed up. I don't know just how the various forms of the contract came down here, but I do know that the final executed draft was the result of about two amendations of the original that had been submitted. I do know that a draft was sent down out of Lead, or brought down out of Lead, because Mr. Joralemon was here September 11th. September 11th Mr. Joralemon was here and he at that time with Mr. Albert sat down and the two of them went over the agreement that had been made. At any rate the agreement was finally executed by Mr. and Mrs. Albert September 21, and despite the fact that the quiet title action had not only been disposed of, but had been completely settled and billed out, the contract continued to refer to that old cloud on the title. I don't know why, unless somebody didn't have enough time to redo it. At any rate, it was signed here September 21 by Greenway Albert and his wife, it was mailed to Mr. Joralemon for signature, he signed it and returned it without acknowledgement, it was sent back to him for acknowledgement, finally acknowledged October the 8th. That is

where we stood, all is well, and the payments started coming in. There were no payments made until the title was cleared up and when this thing was signed, then the next payment was made in September, I believe September the 20th.

All right. Now, I will put September 21 on the final contract (indicating on blackboard). Now, November the 5th Mr. Joralemon wrote the letter to Mr. Albert, which will be in evidence, and in which he says: We are reluctantly forced to surrender our lease. The $7,000 payment which is due will be made and the quitclaim deed provided for a paragraph three of the contract will be forwarded as soon as practicable. That was the letter, it was mailed by Mr. Joralemon November 5th. November 6th the next day, out of the San Francisco office came two checks to Mr. Albert, one of them was for $1,000, which was the usual monthly rental; the other one was for $3,932.15, that being their idea of the $7,000 payment after they had made their adjustment under their theory of that $4,000. Now, the provisions of the contract itself, paragraph three—and this begins to point out what to me is the second important legal question in the case. As a condition precedent to the right to terminate the contract, and this provision the evidence will show came in at Mr. Albert's insistence, paragraph three of the contract says that they may surrender any time after the payment of the first quarterly payment of $7,000. The payment of that first quarterly payment is a condition precedent to their right to terminate. And further that the notice shall be ac-

companied by a quitclaim deed. Those are the provisions of paragraph three. And an ambiguity arises because whoever drafted the contract literally lifted out of that agreement, which was another provision which now appears in the lease at paragraph thirteen. It was bodily lifted out of the former agreement, or this portion of it was, and it contains another termination agreement in which no reference is made to the quitclaim deed. So that is the second legal question, your Honor has, is there a legal ambiguity there. I believe just as an insight that the Court will be satisfied that the ambiguity, if any, is easily resolved and that the provisions of paragraph three requiring the first quarterly payment to be made is a condition precedent and requiring the deed, are valid provisions of the contract. This was November 5th, came the letter from Mr. Joralemon. The quarterly payment, even on their theory hadn't been made, but what is a day or two. In line with Mr. Dolph's suggestion to the Court that they will show a lot of correspondence and conversation thereafter, they will not. They will show one telephone call from Mr. Albert to Mr. Joralemon, and the date of that call was November 16th, and they will show one letter from Mr. Conner to Mr. Driscoll, the date of which is November 21, period. That is all the calls and telephone calls they will point out to the Court, because that is all there were. On November the 5th we got the letter from Joralemon; November 16th Greenway Albert called Mr. Joralemon in San Francisco and

there were two things discussed, number one, he said: I would like to have the logs on your drilling down there, and number two, is they didn't send me my money. Mr. Joralemon's reply to that was: We will send you the logs and our attorneys are taking care of the money. That telephone call was November 16th. November the 21st, five days later, Mr. Conner addressed a letter to Mr. Dricoll saying that they had not sent the money and Mr. Albert would like to have it. They hadn't sent any money. To that letter Mr. Conner got a very stern reply from Mr. Driscoll, dated November 26th, if my memory doesn't fail me—I will put the original letter in. Mr. Driscoll wrote a very, [24] very stern reply to Mr. Conner, which the Court will have an opportunity to read. The last line in that letter said: You will hear from us shortly. You will hear from us shortly. The evidence will show that we heard not one other single word from anybody until January the 3rd, we got a check in the mail from San Francisco from a secretary of one of the offices up in there: Sorry we made a mistake, here is $1,200 more. That letter will be in evidence. That was mailed out of San Francisco; I think the letter was dated January 3rd, I am not sure. The draft was dated December 31.

Now, the position we take is simply this, that the payment, the quarterly payment was a condition precedent to the right to terminate and regardless of the position they take on that $4,000, by their own testimony, taking their own theory of it, they didn't pay what they had to pay as a condition

precedent to their right to terminate until January 3, 1957. And the man who wrote the language, to wit, Driscoll, will testify to the court, at least he testified to me on deposition, that to his intendment, of his own language, the accurate payment was not made until January 3, 1957. And the position we simply take is that of course there had been no valid termination until the condition precedent had been complied with. After we got that letter of January 3 there was a deathly silence pervaded the atmosphere, Mr. Greenway Albert making various trips to Mr. Conner, pointing out to him [25] that he would certainly like to have his money, which was not forthcoming, and accordingly finally on April 16th, Mr. Conner wrote a letter to Mr. Joralemon saying that he couldn't understand why they weren't living up to their contract, in effect. It went on for several pages, and that letter was written April 16th. To that letter we received absolutely no reply and one month later, May 16th, Mr. Conner wrote them again, saying: Would you mind replying to our letter. May 21st we got an answer from Mr. Joralemon saying: Well, Mr. Driscoll should have been in touch with you before now, but surely he will be in touch with you soon. And the next thing we know they got in touch with us by suing us nine days later. At all times under this contract the mining company had the benefit of a provision whereby they could avoid any position of being in default on the payment of money by a simple expedient of going down and depositing in a local bank that amount of money, thereby curing any position of

default with respect to the payment of money. It was that precise provision of the contract they availed themselves of when they filed this suit and deposited the $23,000, so they could avoid the position of continuing to be in default.

Mr. Bilby: Your Honor, are we going to argue the case now or state the facts?

The Court: You are getting into argument.

Mr. McCarty: All right. At any rate the [26] legal points are what I am trying to get into. That in a nutshell is what the facts of the case are and the legal positions we hold and I think the lawsuit is just that simple.

The Court: I may say to counsel that I have been helped by the statements. I think it was time well spent.

IRA B. JORALEMON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Dolph:

Q. Will you state your full name, please?

A. Ira B. Joralemon.

Q. You are the plaintiff in this action?

A. I am.

Q. Where do you live, Mr. Joralemon?

A. My home is in Berkeley, California; my office in San Francisco.

(Plaintiff's Exhibit 1 marked for identification.)

Q. (By Mr. Dolph): I hand you Plaintiff's Exhibit 1 for identification, Mr. Joralemon. Would you examine that and state whether your signature is affixed to it? A. It is.

Q. You recognize the other signature? [27]

A. I recognize that, yes.

Q. Who is that?

A. Mr. and Mrs. Albert.

Q. And that was executed by you and the Alberts on what date? A. March 21st, 1956.

(Plaintiff's Exhibit 2 marked for identification.)

Q. (By Mr. Dolph): I hand you Exhibit 2 for identification and ask you to examine it and state whose signatures are affixed to it?

A. Mr. and Mrs. Albert and my own signature.

(Plaintiff's Exhibit 3 marked for identification.)

Q. (By Mr. Dolph): Would you do the same with regard to Exhibit 3 for identification?

A. That is also signed by Mr. and Mrs. Albert and myself. Do you want the date?

Q. No. Can you tell me when you and the Alberts signed Exhibit 3 for identification?

A. The Alberts signed on September 21, 1956. I had it acknowledged on October 8th, 1956.

Mr. Dolph: I offer all these in evidence.

Mr. McCarty: Is 2 for identification the memo of May 16th?

Mr. Dolph: Right.

(Testimony of Ira B. Joralemon.)

Mr. McCarty: I have no objection, your [28] Honor.

The Court: They all may be received as 1, 2 and 3 in evidence.

(Plaintiff's Exhibits 1, 2 and 3 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 1

Tucson, Arizona,
March 21, 1956.

Suggested Terms of Option

From H. Greenway Albert and wife to Ira B. Joralemon or his Assignees on 35 claims of the Cornelia Group, named Cornelia No. 1 to No. 35, inclusive, and the Cornelia Extension A, B, C and D Claims.

1. Joralemon is given 3 months for preliminary exploration for $1,000 per month paid to Greenway on the first of every month, starting April 1, 1956.

2. At the end of 3 months Joralemon shall pay $7,000 in addition to $1,000 per month. These $1,000 per month payments continue.

3. Beginning at the end of 6 months, Joralemon shall pay $7,000 at the beginning of every 3 months period, in addition to the $1,000 per month payments, which shall continue. These such additional $7,000 payments, together with the regular $1,000

(Testimony of Ira B. Joralemon.)

per month payments, will hold the option for 15 months from April 1, 1956.

4. At the end of 15 months Joralemon shall pay $75,000, and the monthly payments of $1,000 per month shall cease.

5. Beginning 18 months from April 1, 1956, Joralemon shall pay $50,000 at the start of every succeeding three months period. These quarterly payments, together with a final payment of a smaller amount, shall continue until all payments by Joralemon or his assignees to Albert shall total $2,000,000, at which time full title to the property shall be transferred to Joralemon, with no further obligation to Albert.

6. This is an option to purchase and not an agreement to purchase, and Joralemon may surrender the option at any time with no obligation save for payment for labor, materials, etc., already incurred by him.

7. Albert will try to obtain the best possible option terms on the Hunter or Copper Giant group of claims, and will assign this option to Joralemon.

8. A formal contract will be drawn embodying the above terms.

Approved in principle, March 21, 1956.

/s/ H. GREENWAY ALBERT,

/s/ MRS. H. GREENWAY ALBERT,

/s/ IRA B. JORALEMON.

Admitted in evidence February 21, 1958.

(Testimony of Ira B. Joralemon.)

PLAINTIFF'S EXHIBIT No. 2

Memorandum Agreement

This Memorandum Agreement, made and entered into this 16th day of May, 1956, by and between H. Greenway Albert and Maja Greenway Albert, husband and wife, hereinafter referred to as Parties of the First Part, and Ira B. Joralemon, hereinafter referred to as Party of the Second Part,

Witnesseth:

Whereas, the parties hereto did on March 21, 1956, enter into a preliminary agreement regarding certain unpatented mining claims situated in the Ajo Mining District, Pima County, Arizona, being thirty-five mining claims of the Cornelia group, named Cornelia No. 1 through Cornelia No. 35, inclusive, and the Cornelia Extension A, B, C and D claims; and

Whereas, the parties hereto are agreeable that that certain preliminary agreement, dated March 21, 1956, be modified as hereinafter set forth.

Now, Therefore, in consideration of the sum of $1.00 in hand paid by each party to the other, the receipt whereof is hereby acknowledged, it is hereby mutually agreed by and between the parties hereto as follows:

1. That said preliminary agreement dated March 21, 1956, be modified in the following respects:

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 2—(Continued)

(a) That the party of the second part shall, upon the execution of this agreement, pay to the parties of the first part the sum of $1,000.00, being the sum which the party of the second part was to pay to the parties of the first part under paragraph 1 of the agreement of March 21, 1956.

(b) That the party of the second part pay to the parties of the first part, on or before June 1, 1956, the additional sum of $1,000.00, which sum is the sum to be paid by the party of the second part to the parties of the first part on May 1, 1956, in accordance with the agreement dated March 21, 1956.

(c) The parties hereto recognize that there are certain title defects in the claims described and the party of the second part desires that the parties of the first part clear title to said mining claims against the Uranium Corporation of America and Mr. and Mrs. John H. White, Jr., either by means of securing quit claim deeds from said persons or by bringing suit to quiet title against them. Said quit claim deeds or ultimate judgment in a court action shall be in a form satisfactory to the party of the second part. If said title defects are not cleared in a manner satisfactory to the party of the second part within a period of two years from the date of execution hereof, then all rights under this agreement and any other agreement between the parties hereto concerning the aforesaid claims are

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 2—(Continued)

terminated. The party of the second part agrees to assume and to pay all necessary legal expenses and court costs in connection with clearing title to said claims. If the parties of the first part bring suit to quiet title against any party suggested by the party of the second part or his counsel, the parties of the first part shall be deemed to have complied with the provisions hereof when the ultimate judgment is entered quieting title against said party.

(d) The party of the second part reserves the right, however, provided he has given ninety days' prior written notice to the parties of the first part, to withdraw from this agreement and any other agreement between the parties hereto concerning the aforesaid claims at any time, upon executing and delivering to the parties of the first part quit claim deeds in and to said mining claims, and provided further the party of the second part has paid all of the aforesaid legal expenses and costs to the date of withdrawal. The party of the second part agrees to do and pay for the necessary assessment work for the year July 1, 1956, to July 1, 1957, unless he has withdrawn from this agreement and any other agreement as hereinbefore provided and provided that said withdrawal is dated not later than April 1, 1957. Any notice of withdrawal shall be sent registered mail to the parties of the first part at Tombstone, Arizona.

(e) Any legal expense incurred incident to the

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 2—(Continued)

foregoing and paid by the party of the second part shall be deducted from future payments to the parties of the first part, prorated over one year's payments as they become due under the terms of the agreement of March 21, 1956.

(f) The provisions of paragraph 7 of the agreement dated March 21, 1956, are hereby terminated and cancelled.

(g) All references in the Memorandum Agreement of March 21, 1956, to the date "April 1, 1956" shall be deemed to mean instead the date upon which the parties of the first part have either secured quit claim deeds or judgment hereinabove set forth acceptable to the party of the second part. All references therein to payments being due at the end of three or six or fifteen months shall be deemed to mean at the end of three or six or fifteen months, as the case may be, after the parties of the first part have received the quit claim deeds or judgment referred to above satisfactory to the party of the second part, it being the intention of the parties hereto that the next payment shall be due on the date of securing the aforesaid deeds or judgment. Notwithstanding anything contained herein to the contrary, the first quarterly payment shall be made within sixty days after securing the aforesaid deeds or judgment and the remaining quarterly payments should be made every three months thereafter.

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 2—(Continued)

(h) The party of the second part shall not be entitled to possession of said mining claims until he has accepted title thereto.

(i) The parties hereto agree to execute a formal agreement involving the Memorandum Agreement of March 21, 1956, as herein modified.

2. Except as herein modified, the Memorandum Agreement dated March 21, 1956, shall remain in full force and effect.

The benefits of this agreement and all other agreements between the parties hereto concerning the claims above mentioned shall inure to the benefit of the heirs, personal representatives or assigns of the parties hereto.

In Witnesseth Whereof, the parties hereto have executed this Memorandum Agreement on the day and year first above written.

/s/ H. GREENWAY ALBERT,

/s/ MAJA GREENWAY ALBERT,
Parties of the First Part.

/s/ IRA B. JORALEMON,
Party of the Second Part.

Admitted in evidence February 21, 1958.

(Testimony of Ira B. Joralemon.)

PLAINTIFF'S EXHIBIT No. 3

Lease and Option to Purchase

Whereas the parties hereto did on March 21, 1956, enter into a preliminary agreement regarding certain unpatented mining claims situated in the Ajo Mining District, Pima County, Arizona, and Whereas that certain preliminary agreement was modified by a memorandum agreement dated May 16, 1956, and Whereas the parties hereto are agreeable that the preliminary agreement of March 21, 1956, as amended by the agreement of May 15, 1956, may be modified in certain respects by this Lease and Option to Purchase Agreement.

Now, Therefore, this lease and option to purchase entered into as of the 1st day of June, 1956, by and between H. Greenway Albert and Maja Greenway Albert, husband and wife, of Tombstone, Arizona, the lessors and optionors (hereinafter called lessors), and Ira B. Joralemon of San Francisco, California, the lessee and optionee (hereinafter called lessee), shall supersede all previous agreements upon the following terms and conditions,

Witnesseth:

1. The Lessors, for and in consideration of the payments hereinafter stated and the covenants and agreements on the part of the Lessee to be kept and performed as hereinafter set forth, hereby lease unto

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

the Lessee, the following named unpatented mining claims, location certificates of which respective mining claims are duly filed for record in the office of the County Recorder of Pima County, Arizona, to which records reference is hereby made for more accurate, complete and detailed description of said claims, and the descriptions of which as set forth and contained in said records are hereby adopted and made a part of this instrument as though fully incorporated herein at length:

Name of Claim	Recorded in Book NNN at Page
Cornelia Extension A	535
Cornelia Extension B	534
Cornelia Extension C	533
Cornelia Extension D	532
Cornelia No. 1	326
Cornelia No. 2	327
Cornelia No. 3	328
Cornelia No. 4	329
Cornelia No. 5	330
Cornelia No. 6	331
Cornelia No. 7	332
Cornelia No. 8	333
Cornelia No. 9	334
Cornelia No. 10	335
Cornelia No. 11	336
Cornelia No. 12	337
Cornelia No. 13	338
Cornelia No. 14	339

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

Cornelia No. 15 340
Cornelia No. 16 341
Cornelia No. 17 342
Cornelia No. 18 343
Cornelia No. 19 344
Cornelia No. 20 345
Cornelia No. 21 346
Cornelia No. 22 347
Cornelia No. 23 348
Cornelia No. 24 349
Cornelia No. 25 350
Cornelia No. 26 351
Cornelia No. 27 352
Cornelia No. 28 353
Cornelia No. 29 354
Cornelia No. 30 355
Cornelia No. 31 356
Cornelia No. 32 357
Cornelia No. 33 358
Cornelia No. 34 359
Cornelia No. 35 360

together with all veins, lodes and mineral deposits in said mining claims, including the dips, spurs, shoots and angles thereof, and any and all shafts, adits, tunnels or other mining workings on the demised claims, with the sole and exclusive possession thereof during the life of this lease, with the sole and exclusive right to prospect, explore, examine, search, sample, test, mine and extract there-

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

from any and all ores, minerals and metals, and to place buildings, equipment, machinery, tools, rails and improvements thereon at the Lessee's sole discretion.

2. This lease shall commence as of the 1st day of June, 1956, and shall expire March 31, 1976, unless sooner terminated in the manner hereinafter provided.

3. Notwithstanding the provisions of paragraph (2) hereof, the lessee may at any time after payment of the first quarterly payment of Seven Thousand Dollars as hereinafter set forth, surrender this lease by giving notice in writing thereof to the lessors, accompained by an executed and acknowledged quitclaim deed extinguishing all rights of the lessee hereunder and relinquishing to the lessors the demised properties. Upon delivery of such notice and deed and the relinquishment of all the demised properties, all rights and obligations of the parties hereto not then accrued shall cease and terminate. The Lessee agrees to do the necessary assessment work from year to year unless he has withdrawn from this agreement, and provided that such withdrawal shall not be dated between April 1st and July 1st of any year unless the assessment work for that year has been completed. Any notice of withdrawal shall be sent by registered or certified mail to the Lessors at Tombstone, Arizona.

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

4. Lessors agree to furnish Lessee access to such abstracts, deeds and other evidences of title as may be in the Lessors' possession or control and to cooperate with the Lessee, at Lessee's option and expense, to have such abstracts brought down to date and to take such steps and proceedings to perfect title as Lessee shall deem advisable. Lessors agree, but at the expense of the Lessee, promptly and diligently to complete the valid location in accordance with the laws of the United States and of the State of Arizona and to the satisfaction of the Lessee, of such of the hereinbefore named mining claims as the Lessee shall request in writing and to post and file in the proper public offices and in the names of the Lessors, such notices of location and amended notices of location as the Lessee may deem advisable, and to erect such location monuments, stakes and posts for the purpose of defining the boundaries of such claims as located or amended, and sink such discovery shafts as may be required by the Lessee, but all at the sole expense of the Lessee.

5. Lessors further represent and agree that the properties covered by this Lease and Option to Purchase, and each of them, are free from all liens and encumbrances of every nature and description, and during the period thereof the Lessors agree to protect said properties from any and all liens and/or the possibility thereof, except such as may

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

arise from the acts of the Lessee on said properties, and not to encumber any of said properties.

6. The Lessee during his possession of said properties agrees to protect all of said properties against all claims of labor and material men and against all liens and liabilities arising out of his acts upon any of said properties. The Lessor shall have the right to enter the property at any reasonable time for inspection thereof and development reports shall be available to him. Lessee also agrees to post the lien notices on the property as required by the laws of Arizona. Lessee also agrees that in any drilling done on the property where drill hole casings are required, to leave said casings in said holes until Lessors have been paid a total sum of Twenty-five Thousand Dollars ($25,000) under the terms of payment set forth herein; after said sum has been paid, Lessee may pull or leave casing in their discretion.

7. The parties hereto recognize that there are certain title defects in the claims described, and Lessee desires that Lessors clear their title to said mining claims against the Uranium Corporation of America and Mr. and Mrs. John H. White, Jr., either by securing quitclaim deeds from them or quieting title. Such quitclaim deeds or ultimate judgment in a court action shall be in a form satisfactory to Lessee. If said title defects are not cleared in a manner satisfactory to Lessee within a

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

period of two years from the date hereof, then all rights between the parties hereto under this agreement shall be terminated. Any legal expense incident to the foregoing paid by Lessee shall be deducted from future payments to Lessors, pro rated over one year's payments as they become due.

8. In consideration for the lease hereunder, the Lessee shall pay to the Lessors the following amounts:

(A) The sum of Two Thousand Dollars ($2,000.00) heretofore paid and receipt of which amount is hereby acknowledged by Lessors.

(B) The sum of One Thousand Dollars ($1,000.00) each month for fourteen (14) additional months commencing on the date Lessors secure the quit claim deeds or quiet title judgment satisfactory to Lessee as referred to above.

(C) The sum of Seven Thousand Dollars ($7,000.00) on or before November 8, 1956.

(D) Three additional payments of Seven Thousand Dollars ($7,000.00) each shall be made three (3), six (6), and nine (9) months, respectively, after the date upon which the payment referred to in subparagraph (C) shall be due.

(E) The sum of Seventy-five Thousand Dollars ($75,000.00) one year after the date upon which the payment referred to in subparagraph (c) shall be due, and

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

(F) The sum of Fifty Thousand Dollars ($50,000.00) shall be be paid fifteen (15) months after the date upon which the payment referred to in subparagraph (C) shall be due, and each and every three (3) months thereafter until the total sum of Two Million Dollars ($2,000,000) shall have been paid by the Lessee to the Lessors, provided, however, that the last payment hereunder shall be such sum smaller than Fifty Thousand Dollars ($50,000) as shall be necessary to equal the above aforesaid total of Two Million Dollars ($2,000,000).

9. If at any time there be more than four parties entitled to payments hereunder, Lessee may withhold payments thereof unless and until all parties designate, in writing, in a recordable instrument to be filed with Lessee, a common agent to receive all payments due to them hereunder, and to execute division and transfer orders on behalf of said parties and their respective successors in title.

10. Lessee will not hold Lessors liable for any injury to or death of persons or loss of or damage to property by fire, water, wreck or other casualty occurring upon the demised properties arising from the existence, maintenance or operation of machinery, equipment, excavations or mine workings or occupation of the premises under this lease by Lessee, and Lessee shall release and discharge, and agree to indemnify and save harmless Lessors and each of them from and against any and all

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

claims, liability, demands, causes of action, judgment, costs, expenses and attorneys' fees arising or growing out of injury to or death of persons, or loss or destruction of or damage to property from any cause resulting directly or indirectly from the operations of the Lessee upon the demised properties or its occupancy thereof, or from the use of said properties by the Lessee.

11. All mines on said premises shall be opened, used and worked in such manner only as is usual and customary in skillful and proper mining operations and so as not to do, cause or permit any unnecessary or unusual permanent injury to the mine or any improper interference or hindrance in the subsequent operation of said mine or mines; provided that, subject to the said requirements, the Lessee may from time to time use and employ such methods of mining as to the whole or any part of the ore upon said property, or under any portion thereof, as he may desire or find most profitable and economical, or may, when he deems it necessary or desirable, discontinue operations entirely so long as he shall well and truly meet his obligations to perform assessment work and make the payments required hereunder; and provided further that nothing contained in said lease shall require the Lessee to mine, preserve or protect in his mining operations any ore which, under good mining practices, cannot be mined and shipped at a profit to the Lessee at the time encountered.

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

12. The Lessee shall agree to pay any and all lawful public taxes and assessments, whether general, specific, or otherwise, that may be levied against his mining equipment and property during the period of said lease, and shall also agree to pay all taxes, State or Federal, which may become due on account of his mining operations or his occupancy of said properties, except taxes accruing by reason of any payments made to the Lessors.

13. Lessee shall agree upon termination of the lease from any cause (other than by reason of transfer of title to the demised claims to the Lessee) to immediately and peaceably surrender possession of the leased property to the Lessors and the workings on said properties shall be left as accessible as is required by good mining practices, and Lessee shall have ninety (90) days after any such termination or surrender in which to remove all engines, tools, machinery, buildings, structures, railroads, or mine tramways, and all other property of every nature and description erected, placed or situated on the premises by him. It shall be further agreed that said lease may be terminated at any time by the Lessee as to all or any portion thereof by giving the Lessors written notice of such intention, and that upon termination or surrender the Lessee will, upon the request by the Lessors, execute and record in the appropriate public office a formal release and

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

discharge evidencing such termination, provided that payments hereunder shall continue as provided hereunder until the lease shall have been terminated as to all of the demised properties.

14. If the payment provided for herein be and remain unpaid after the days and times specified or if the Lessee shall fail to keep any of the other conditions in said lease expressed, and if any such failure shall continue for thirty (30) days after written notice from the Lessors specifying any such default, then and in that event the Lessors may immediately enter upon and take possession of the leased premises and any ores thereon, and declare the lease terminated. It shall be agreed, however, that any default claimed and noticed against Lessee as respects the payment of money can be cured by the deposit in escrow in a reputable bank or trust company of the amount in controversy, subject to notice of such deposit to Lessors, and to remain in escrow until decision by court or arbitrators as the parties may elect.

15. If Lessee shall be delayed or prevented from performing the obligations under this Lease and Option to Purchase, on his part to be performed, by reason of any act of God, strike, or threat of strike, sabotage, fire, flood, weather or other act of nature, war, insurrection or mob violence, inability to secure labor or materials, equipment or supplies, delay in, interruption of or inability to secure transportation,

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

orders or restrictions, regulations or requirements of the Federal or State government relating to manpower, materials or supplies, mining operations or otherwise, unavoidable casualties, injunction or other legal proceeding, or any cause, act or occurrence beyond the control of the Lessee, whether of the same or of a different kind or character than those hereinbefore mentioned, then and in such event the Lessee shall be excused from the performance of its obligations and payments as provided herein shall be suspended under this lease during such period of delay and any such delay shall not be deemed a breach of this lease nor shall it be deemed a default on the part of Lessee. The Lessee agrees to use all reasonable diligence to remove any such cause of disability as may occur from time to time.

16. The Lessee shall have the option, exercisable at any time during the term of the lease hereunder, to purchase all of the demised claims, provided this agreement is in full force and effect. Said option shall be exercisable by a notice in writing thereof to the Lessors. The purchase price shall be the amount of Two Million Dollars ($2,000,000) on which sum shall be credited all payments theretofore made by the Lessee to the Lessors hereunder. The balance of said purchase price shall be paid to the Lessors upon delivery of good and sufficient deeds for the demised properties conveying good and merchanta-

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

ble title thereto, free of all liens and encumbrances and subject only to the paramount title of the United States.

17. When the total payments theretofore made by the Lessee to the Lessors under this Lease and Option to Purchase shall total the amount of Two Million Dollars ($2,000,000) title to the demised properties shall be transferred to the Lessee, and the Lessors agree to execute in favor of the Lessee good and sufficient deeds for the demised properties conveying good and merchantable title thereto, free of all liens and encumbrances and subject only to the paramount title of the United States.

18. Any notice required or permitted to be given hereunder (including notice of the exercise of any option) shall be considered as delivered seventy-two (72) hours after the same shall have been deposited in the United States mail, duly registered or certified with postage thereon prepaid, addressed, if to Lessee, to Ira B. Joralemon, c/o Homestake Mining Company, 100 Bush Street, San Francisco 4, California, and if to Lessors to H. Greenway Albert (who is hereby designated as the representative of the Lessors), Tombstone, Arizona, or in the event of the death of said Lessors' representative, then to both the Lessors undersigned, their heirs or legal representative, at Tombstone, Arizona. Lessee, Lessors and the Representative of Lessors may change

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

said addresses upon written notice given to the other party hereto.

19. This Lease and Option to Purchase shall inure to the benefit of and be binding upon the respective heirs, administrators, executors, and assigns of the parties hereto. Lessee may assign his right and obligations hereunder.

20. The relationship hereby created between the parties is that of landlord and tenant or, in the event that title to the properties shall pass to the Lessee hereunder, that of buyer and seller, and not of co-partnership or joint venture.

21. The parties hereto agree to execute any and all documents and agreements which shall be necessary fully to carry out the provisions of this Lease and Option to Purchase.

In Witness Whereof, the parties have executed this Lease and Option to Purchase as of the date first hereinbefore written.

/s/ H. GREENWAY ALBERT,

/s/ MAJA GREENWAY ALBERT,
Lessors and Optionors.

/s/ IRA B. JORALEMON,
Lessee and Optionee.

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 3—(Continued)

State of Arizona,
County of Cochise—ss.

This instrument was acknowledged before me this 21st day of September, 1956, by H. Greenway Albert and Maja Greenway Albert, husband and wife.

[Seal] /s/ CHARLES E. CONNER,
Notary Public.

My Commission expires: March 16, 1958.

State of California,
City and County of San Francisco—ss.

This instrument was acknowledged before me this 8th day of October, 1956, by Ira B. Joralemon.

[Seal] /s/ ALICE McCUE,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires May 5, 1958.

Admitted in evidence February 21, 1958.

Q. (By Mr. Dolph): In connection with Exhibit 3 in evidence, paragraph seven refers to certain title defects. Are you familiar with the activity that took place in connection with those title defects?

(Testimony of Ira B. Joralemon.)

A. Moderately familiar, not all the details, but I followed the general procedure.

Q. You know you had Mr. Conner institute an action? A. Correct.

Q. And that you assumed the expenses, his attorney's fees and court costs?

A. That was correct.

Q. And all other legal expenses? A. Yes.

Q. After the execution of your original agreement, did you, your agents or independent contractors go in and explore the mining property referred to in those agreements?

A. We did, after the title was cleared. We did not do the actual exploration until the title was cleared.

Q. When you refer to the title being cleared, you are referring to the defects of title referred to in paragraph seven of the agreement?

A. That is true. [29]

Q. Your White and Uranium Company?

A. That is true.

Q. When is it you went in and started your work?

A. It was approximately—may I refer to the memorandum?

Mr. Dolph: Do you have any objection, Mr. McCarty?

Mr. McCarty: No, I haven't any objection.

The Witness: It was approximately—it was in the last week in September, close to the 1st of October.

(Testimony of Ira B. Joralemon.)

Q. (By Mr. Dolph): Can you tell the Court approximately what the work was that you did?

Mr. McCarty: I object on the ground it is immaterial, save insofar as it is intended to prove that they did enough work to comply with the contract, to do the assessment work, and as to that point I will stipulate that they did that much work. Aside from that it is immaterial what they did on the premises.

Mr. Dolph: It is material as to the good faith of the tenant, your Honor.

Mr. McCarty: That isn't an issue in the case.

The Court: I wouldn't see the materiality of that. There is no question of good faith here, is there, Mr. McCarty?

Mr. McCarty: Sir?

The Court: As I understand, you are not questioning the good faith?

Mr. McCarty: No. I will stipulate they went in and [30] did all the work the contract required them to do.

Mr. Dolph: Will you stipulate proper assessment work affidavits were filed?

Mr. McCarty: I will stipulate that they conformed exactly with the contract in respect to the manner in which they drilled the holes, left the holes and did the assessment work.

Mr. Dolph: All right.

Q. (By Mr. Dolph): On or about the 4th of November, what were your findings on these properties?

(Testimony of Ira B. Joralemon.)

A. We found absolutely no ore. The geological theory on which the work was based was partly correct, but we didn't find any ore.

Q. Did you have any correspondence with Mr. and Mrs. Albert in connection with that on or about that date?

Mr. McCarty: What date are you referring to, Mr. Dolph?

Mr. Dolph: I said November 3rd or 4th.

A. I wrote Mr. Albert, I believe it was November 5th, telling him I was sorry we hadn't found any ore——

Mr. McCarty: One moment, Mr. Joralemon. Your Honor, I think that what you said will appear from the letter itself. I think the question has been answered, if the Court please, when he testified he wrote them on November 5th.

The Court: I think, Mr. Joralemon, counsel is going [31] to show you your letter now.

(Plaintiff's Exhibit 4 marked for identification.)

Q. (By Mr. Dolph): Handing you Exhibit 4 for identification, is that the letter you have referred to? A. That is the letter.

Q. Can you tell us from looking at that when it was you mailed that to Mr. and Mrs. Albert?

A. On November 5th, 1956.

Mr. Dolph: Offer Exhibit 4 into evidence.

Mr. McCarty: No objection.

(Testimony of Ira B. Joralemon.)

The Court: It may be received as Exhibit 4 in evidence.

(Plaintiff's Exhibit 4 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 4

November 5, 1956

Mr. H. Greenway Albert,
P. O. Box 246,
Tombstone, Arizona.

Dear Greenway:

As we have found no ore in five drillholes on your Cornelia group of claims, I am reluctantly forced to surrender the lease and option to me on the 39 claims in the Ajo mining district that was signed by you and Mrs. Albert on September 21, 1956. The $7000 payment due on November 8, 1956, will be paid when due, and the quitclaim deed specified in Paragraph 3 of the contract will be sent to you as soon as practicable.

While we found a little lean disseminated copper bearing porphyry in one hole, our drilling proved that in most of the area either deep fanglomerate or barren pre-Cambrian micaceous quartzite underlie 100 to 200 feet of alluvium. There is not room for a valuable ore body between these two barren formations.

(Testimony of Ira B. Joralemon.)

I am sorry we did not have better luck in the exploration.

Yours sincerely,

/s/ IRA B. JORALEMON.

IBJ:B

cc: Mrs. Maja Greenway Albert
Mr. Charles E. Conner
Dr. D. H. McLaughlin
Mr. Kenneth C. Kellar

Admitted in evidence February 21, 1958.

Q. (By Mr. Dolph): You did move off of the property covered by the agreements, did you not, Mr. Joralemon? A. Immediately.

Q. About when was that?

A. About the 4th of November.

Q. Have you ever been back on the properties since then? A. Never have.

Q. Did you have any contact with Mr. Albert shortly after you had written this letter of November 5th? A. I did.

Q. What kind of contact was that?

A. He telephoned to me—— [32]

Q. Approximately when?

A. Approximately November 16th or 18th.

Q. Do you know his voice over the telephone?

A. I do.

(Testimony of Ira B. Joralemon.)

Q. Would you relate to us what that conversation was, as nearly as you can recall it?

A. He first asked me if I would send him copies of the logs of the holes, giving the results of this exploration work; and I said I would be glad to do so. And he also said that he did not think that he had been paid the right amount under the contract, the right payment that was due early in November, the quarterly payment; and I said that that was a legal matter to decide how much of the expenses of clearing the title from Uranium Corporation could be deducted, and that I couldn't pass on that.

Q. Was there any discussion between you as to his receipt of your letter of November 5th?

A. He mentioned the fact that he had received it and was sorry we hadn't found ore.

Q. Did he request from you any release or quitclaim deed to those mining claims?

A. He did not.

Q. Has he ever at any time since then made such a request?

A. Through Mr. Conner in April, I think it was, April [33] the following year.

Q. Of 1957? A. 1957.

Q. But up until that time? A. No word.

Q. You have never received such a demand or request?

A. Not only that, but I did not know that the quitclaim deeds had not been sent.

Q. Did you in your discussion with Mr. Albert,

(Testimony of Ira B. Joralemon.)

did he tell you anything to the effect that it was his position that until the deed or release had been received by him there would be no termination on the lease and option?

Mr. McCarty: I object to his leading the witness. The witness has already testified to what the conversation was and I don't see any purpose to be served in a bunch of leading questions as to what was not said.

The Court: The question is leading.

Mr. Dolph: I will withdraw it.

Q. (By Mr. Dolph): Have you related the whole conversation you had with Mr. Albert?

A. I have.

Q. Did you respond to Mr. Albert's request to furnish him with information in connection with your logs?

A. I did. I sent him copies of the logs and a sketch of the location of the holes. [34]

Mr. Dolph: I can't find the original of this letter from Mr. Conner, Mr. McCarty. Do you object to this copy that was in the deposition on the ground of the best evidence?

Mr. McCarty: Is that the letter of April 16th?

The Witness: I think the original may be in my brief case.

Mr. McCarty: I have no objection to the use of the copy, Mr. Dolph.

(Plaintiff's Exhibit 5 marked for identification.)

(Testimony of Ira B. Joralemon.)

Q. (By Mr. Dolph): Handing you Exhibit 5 for identification, and ask you if that is your letter to Mr. Albert? A. That is.

Q. And you sent this to him on or about November 16th?

A. On November 16th is correct.

Mr. Dolph: I offer it in evidence.

Mr. McCarty: No objection.

The Court: It may be received.

(Plaintiff's Exhibit 5 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 5

November 16, 1956

Mr. H. Greenway Albert,
P. O. Box 246,
Tombstone, Arizona.

Dear Greenway:

Following our telephone talk of this morning, I am sending you herewith the logs of our five drill-holes at Ajo and a sketch showing the location of these holes.

Holes 2, 3 and 4 showed that the fanglomerate extends much further east under the deep alluvium than I expected. Holes 1 and 5 went directly from alluvium into a complex, highly altered granitized quartzite or quartz mica schist, with inclusions of dark altered volcanic rock. This is almost certainly

(Testimony of Ira B. Joralemon.)
the pre-Cambrian "Cardigan Gneiss" that Gilluly maps as occurring 4 to 8 miles northwest of your property. This same ancient rock was cut by the last 35 ft. in our Hole No. 3.

Between the fanglomerate and the gneiss our Holes 2, 3 and 4 cut a partly porphyritic acid igneous rock that is probably a phase of the monzonite porphyry. This porphyritic rock is slightly pyritic in places in Holes 2 and 4, and a very small amount of disseminated chalcopyrite was noted from 388 to 395 ft., and at 565 ft. in Hole 2.

While the interpretation of the geology under the thick alluvium is uncertain, it seems likely that a large northeast fault, dipping west, brings in the pre-Cambrian. This means that there is only a narrow belt of monzonite or similar intrusive. This intrusive is so slightly mineralized that I can see no chance that it contains workable ore in this area.

I am sorry that we did not succeed in finding ore. We tried hard. Maybe some other theory will be more successful.

With kind regards for Mrs. Albert,

Yours sincerely,

/s/ IRA B. JORALEMON.

IBJ:B

cc: Dr. D. H. McLaughlin

Admitted in evidence February 21, 1958.

(Testimony of Ira B. Joralemon.)

(Plaintiff's Exhibit 6 marked for identification.)

Q. (By Mr. Dolph): I hand you Exhibit 6 for identification and ask you if you recognize that?

A. I do.

Q. Did you receive that letter?

A. I did not personally. It is addressed to Mr. Driscoll. I saw it later. [35]

Q. You saw it?

Mr. McCarty: I will make any stipulation with respect to the letter that you want, if you want it in evidence at this time.

Mr. Dolph: We might as well stipulate that this was sent to Mr. Driscoll on or about the date it bears.

Mr. McCarty: I will stipulate the letter is an original letter signed by Mr. Conner and that it was sent by Mr. Conner to Mr. Driscoll on or about the date which appears on the letter.

Mr Dolph: I offer it in evidence.

Mr. McCarty: No objection.

The Court: What was that date?

Mr. Dolph: November 21, 1956.

The Court: It may be received.

(Plaintiff's Exhibit 6 marked in evidence.)

(Testimony of Ira B. Joralemon.)

PLAINTIFF'S EXHIBIT No. 6

Conner & Jones
Attorneys at Law
P. O. Box 310
509-514 Valley National Building
Tucson, Arizona

November 21, 1956

Mr. R. E. Driscoll, Jr.,
Kellar & Kellar & Driscoll,
Attorneys at Law,
Lead, South Dakota.

Re: Homestake Mining Company—
H. Greenway Albert.

Dear Mr. Driscoll:

Mr. H. Greenway Albert has been in to see me relative to the payment of $7000.00 which was to be made by Mr. Joralemon. Mr. Albert brought in a check for $3932.15, being the balance of the $7000.00 which Mr. Joralemon claims is due.

In checking the voucher we find that not only the legal expense of $601.77 was taken into consideration but, also, the $4000.00 which Mr. Joralemon paid to Mr. White and others to secure a prompt settlement of the suit to quiet title. In discussing that settlement, it was distinctly understood that this $4000.00 was not to be charged against Mr. Albert.

(Testimony of Ira B. Joralemon.)

Also the statement shows that Mr. Albert was charged 12/18ths of the legal expense of $601.77 whereas we figure he should only be charged 5/12ths or $250.74.

We feel that Mr. Albert should receive a check for $6749.26 and would appreciate your taking this up with Mr. Joralemon at an early date and let us hear from you.

Yours very truly,

CONNER & JONES,

By /s/ CHARLES E. CONNER.

CEC:CR

cc: to Mr. H. Greenway Albert,
P. O. Box 246,
Tombstone, Arizona.

Admitted in evidence February 21, 1956.

(Plaintiff's Exhibit 7 marked for identification.)

Q. (By Mr. Dolph): I hand you Plaintiff's Exhibit 7 for identification and ask you if you recognize that as a copy of a letter that you received on or about two or three days later than the date it bears? A. I do.

Q. That was signed by Mr. Conner?

A. Correct.

(Testimony of Ira B. Joralemon.)

Mr. Dolph: Will you stipulate to the same effect [36] with regard to this exhibit, Mr. McCarty? It is a letter of April 16th.

Mr. McCarty: I am sure that is a correct copy of the original, Bill.

Mr. Dolph: As far as I know it is, yes.

Mr. McCarty: I will stipulate that on that date Mr. Conner addressed a letter to Mr. Joralemon, it was mailed on or about that date, and that is a true copy of it. I make that in reliance on the fact it is a true copy.

Mr. Bilby: When the depositions were taken Mr. Conner was there then?

Mr. McCarty: I understood Mr. Joralemon to say he had the original in the courtroom.

Mr. Dolph: We will be glad to produce that. May we have an opportunity to let him get his briefcase and substitute the original?

Mr. McCarty: To save time I will so stipulate.

Mr. Dolph: All right. I offer that in evidence.

The Court: Received as 7 in evidence.

(Plaintiff's Exhibit 7 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 7

April 16, 1957

Mr. Ira B. Joralemon,
c/o Homestake Mining Company,
100 Bush Street,
San Francisco 4, California.

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 7—(Continued)

Re: Lease and Option to Purchase

Dear Mr. Joralemon:

We are writing this letter at the request of Mr. H. Greenway Albert and his wife, Maja Greenway Albert, of Tombstone, Arizona, in connection with that certain Lease and Option to Purchase which was entered into by and between H. Greenway Albert and Maja Greenway Albert, husband and wife, as lessors and optionors, and Ira B. Joralemon, as lessee and optionee.

We call attention to paragraph 2 of said agreement which provides that the lease shall commence as of the first day of June, 1956, and shall expire March 31, 1976, unless sooner terminated in the manner thereafter provided in said agreement. Paragraph 3 of said agreement provides that the lessee may at any time after the payment of the first quarterly payment of $7000.00 surrender the lease by giving notice in writing thereof to the lessors, accompanied by an executed and acknowledged quitclaim deed extinguishing all rights of the lessee thereunder and relinquishing to the lessors the demised properties. Said paragraph further provides that upon delivery of such notice and deed and the relinquishment of all of the demised properties, all rights and obligations of the parties thereto not then accrued shall cease and terminate, and also provides that lessee may not withdraw from said

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 7—(Continued)

lease agreement between April 1st and July 1st of any year unless the assessment work for that year has been completed.

On November 5, 1956, you wrote a letter to Mr. Albert in which you advised him that you were forced to surrender the lease and option. In your letter you further stated that the $7000.00 due on November 8, 1956, would be paid when due "and the quitclaim deed specified in paragraph 3 of the contract will be sent to you as soon as practicable." It is our opinion that your letter of November 5, 1956, in no way complies with the provisions of paragraph 3 of said agreement. Furthermore, as of this date no quitclaim deed, as provided for in said agreement, has been delivered to the lessors.

Therefore, it is our clients' position that the lease and option to purchase is still in full force and effect and they have advised us that there are five monthly payments of $1000.00 each due, and, also, the quarterly payment of $7000.00 due on February 8, 1957, has not been paid, and demand is hereby made upon you for the payment of said sums totaling $12,000.00, less that portion of the legal expense of $601.77 which you would be entitled to be reimbursed for.

In November of 1956, Mr. and Mrs. Albert received a check from the Homestake Mining Company for $3932.15 which purported to be the quarterly payment of $7000.00 due on November 8,

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 7—(Continued)

1956, from which you deducted the sum of $3067.85. claiming that to be the correct amount to deduct for legal expenses.

We wrote Mr. R. E. Driscoll, Jr. on November 21, 1956, advising him that our calculations showed that only the sum of $250.74 should have been deducted from said payment of $7000.00, We also advised him that the $4000.00 which was paid in settlement of the suit to quiet title was not a legal expense under the terms of the contract.

On November 26, 1956, Mr. Driscoll advised us that we would no doubt be hearing from San Francisco, either directly or through his office, in the near future in reply to our letter of November 21, 1956. To date we have not received any such reply. However, on December 31, 1956, a check in the sum of $1286.52 was sent to Mr. Albert with the simple explanation that the same covered an error made in computation in regard to the prior check. Our calculation shows that you still owe Mr. and Mrs. Albert the sum of $1535.59 in connection with the quarterly payment due on November 8, 1956.

Our clients are assuming that you will live up to the terms of the Lease and Option to Purchase and do the assessment work on the mining claims covered by the agreement for this year.

Our clients take the position that the Lease and Option to Purchase agreement is still in full force

(Testimony of Ira B. Joralemon.)

Plaintiff's Exhibit No. 7—(Continued)

and effect, and demand is hereby made upon you for full compliance therewith, and consequently have not cashed the checks mentioned in this letter, to wit, one for $3932.15 and one for $1286.52.

Yours very truly,

CONNER & JONES,

By.....

CEC:CR

Admitted in evidence February 21, 1958.

Q. (By Mr. Dolph): Mr. Joralemon, between your letter of November 5th and this letter, which is Exhibit 7 in evidence, in the neighborhood of April 16th, 1957, was any demand made upon you to furnish Mr. and Mrs. Albert with a release or quitclaim relating to the mining claims covered by your lease [37] and option agreement?

A. No, sir.

Q. Did you have any knowledge at that time that Mr. and Mrs. Albert took the position that the furnishing of such a release of quitclaim was a prerequisite to a termination of such lease and option?

Mr. McCarty: I object on the ground it is immaterial, leading.

The Court: It may stand. He may answer.

(Testimony of Ira B. Joralemon.)

Q. (By Mr. Dolph): Do you remember the question, Mr. Joralemon?

A. I remember the question. I did not.

Q. Can you answer the same question with regard to such a position in connection with a payment of everything that was due under the quarterly payment falling due November 18th?

A. That was never taken up with me and I did not know it was questioned. I knew there was a controversy as to the amount due, but I was never told that the contract could not be cancelled until that controversy had been settled.

Q. If you had received a request or demand for a release of quitclaim deed from Mr. Albert or anybody acting on his behalf, what would you have done?

Mr. McCarty: I object on the ground that is a wholly immaterial and improper question, if the Court please, to ask what a witness would have done if something would have happened. [38]

The Court: Objection sustained.

Mr. Dolph: If the Court please, may I be heard on that? We have a question of waiver or estoppel in connection with this. I think we have a right to prove that Mr. Joralemon stood ready, willing and able to furnish anything that was requested at any time, and that he would have done so had it been requested.

Mr. McCarty: Whether or not the facts of the case are such as to prove a reliance on the conduct of another is a matter to be found from the facts

(Testimony of Ira B. Joralemon.)

and circumstances of the case, not the witness' self serving declaration that, "I relied on so and so." That is the ultimate fact in the case to be determined from the circumstances.

The Court: I am going to let it stand. I am going to let him answer it. I don't know whether it could become material or not, but I will let him answer it and disregard it if it should become immaterial.

A. I would have seen that the quitclaim deed was sent at once if I had been informed that it had not been sent and had been asked for.

Mr. Dolph: You may cross-examine.

Cross-Examination

By Mr. McCarty:

Q. Mr. Joralemon, you have been a mining engineer for [39] many, many years now, right?

A. I have.

Q. In the course of your employment you find it expedient to find mining properties and interest mining company clients of yours in the properties, right? A. That is true.

Q. In this particular case you did in fact interest in this particular property the Homestake Mining Company, is that correct?

A. Substantially correct. It wasn't the full way in which it came up, but that is substantially correct.

Q. As a result of your discussions with Home-

(Testimony of Ira B. Joralemon.)

stake, the deals you made with Mr. Albert belonged ninety per cent to the Homestake Mining Company and ten per cent to you or to your designee, right?

A. There was the arrangement by which I was to participate to the extent of ten per cent if I so desired, after a certain amount had been spent.

Q. And Homestake was to participate to the extent of ninety per cent?

A. They were to do that and I was to plan the work.

Q. You are familiar with Mr. Driscoll who sits here in the courtroom? A. I am.

Q. He is an attorney in Lead, South Dakota?

A. Yes. [40]

Q. And to your knowledge he is one of the attorneys for Homestake Mining Company, right?

A. He is.

Q. Your office is now and was during the course of this negotiation in San Francisco, California?

A. That is correct.

Q. That is also the home office of the Homestake Mining Company? A. It is.

Q. You of course recall when you came down here to Tucson about March 21 and signed that first agreement which is now in evidence as Plaintiff's Exhibit 1, you recall coming down and talking to Greenway Albert about that? A. I do.

Q. You recall after that this title difficulty arose and became more serious as time went by, and eventually I suppose you were active in getting Mr. Driscoll to come to Tucson, Arizona, to see what he

(Testimony of Ira B. Joralemon.)

could do about it? A. Yes.

Q. You recall this memorandum agreement of May 16, which is now in evidence as Plaintiff's Exhibit 2, was mailed to you in San Francisco, California, you remember that?

A. That is correct.

Q. You possibly remember you signed it within a few days [41] of that date and indicated to Mr. Conner he was at liberty to deliver to Mr. Albert the sum of $1,000, which you had left in Mr. Conner's hands? A. That is my recollection.

Mr. McCarty: I wonder if we could have that letter?

(Defendant's Exhibits A and B marked for identification.)

Q. (By Mr. McCarty): Starting first with this B for identification, Mr. Joralemon, it is a copy of a letter which I have in my file. Would you examine that, please?

As far as you know that is a true copy of the letter which you got from Mr. Conner forwarding this memorandum agreement of May 16, which is Plaintiff's Exhibit 2?

A. As far as I know it is.

Q. You probably have the original in your file here?

A. Not here. I don't know where that is.

Mr. McCarty: We will offer that in evidence.

Mr. Dolph: No objection.

The Court: It may be received as B in evidence.

(Defendants' Exhibit B marked in evidence.)

(Testimony of Ira B. Joralemon.)

DEFENDANTS' EXHIBIT B

May 16, 1956

Mr. Ira B. Joralemon,
c/o Homestake Mining Company,
100 Bush Street,
San Francisco, California.

Re: Mr. and Mrs. Greenway Albert.

Dear Mr. Joralemon:

Pursuant to Mr. Driscoll's instructions, we are enclosing you herewith two copies of the Memorandum Agreement which have been executed by Mr. and Mrs. Albert. We are sending a copy of this agreement direct to Mr. Driscoll. If the agreement, as drawn, meets with your approval will you kindly execute the same and return one executed copy to us.

Please also let us know when we may release the $1,000.00 to Mr. and Mrs. Albert.

Yours very truly,

CONNER & JONES,

By.....

CEC/vsb
Enclosures

cc: Mr. R. E. Driscoll, Jr.

Admitted in evidence February 21, 1958.

(Testimony of Ira B. Joralemon.)

Q. (By Mr. McCarty): To that letter, Mr. Joralemon, you replied with this letter which is Defendants' Exhibit A for identification, is that correct? A. That is correct.

Mr. McCarty: We will offer A into evidence.

Mr. Dolph: No objection.

The Court: It may be received as A in evidence.

(Defendants' Exhibit A marked in evidence.)

DEFENDANTS' EXHIBIT A

May 21, 1956.

Mr. Charles E. Conner,
P. O. Box 310,
Tucson, Arizona.

Dear Mr. Conner:

On my return to San Francisco I have gone over the agreement you sent me on May 16 and find it in order. I am therefore executing the agreement and returning the original to you herewith.

It will be in order for you to release the first payment of $1,000 to Mr. and Mrs. Albert on receipt of this letter.

I hope to find out the full name of Mrs. John H. White Jr., and the White's home address in Salt Lake, and expect to be able to send these to you tomorrow.

(Testimony of Ira B. Joralemon.)

Yours very truly,

/s/ IRA B. JORALEMON.

IBJ:B
Enc.

cc: Dr. Donald H. McLaughlin
Mr. R. E. Driscoll, Jr.

Admitted in evidence February 21, 1958.

Q. (By Mr. McCarty): Then I would assume, Mr. Joralemon, from the tenor of this letter of May 21 that it is the letter with which you returned the memorandum agreement of May 16th?

A. It says in the letter it is accompanied by the contract.

Q. Authorizing Mr. Conner to release the $1,000 to Mr. Albert, right? A. Yes.

Q. Following that letter, Mr. Joralemon, the fact of the matter is, the next few months were largely taken up with the matter of cleaning up the title defect? A. I couldn't hear you.

Q. I say, following that letter of May 21, the next couple of months were involved in the proposition of trying to get the title cleared up?

A. That is right.

Q. Mr. Driscoll was working with Mr. Conner in that respect? A. He was.

Q. Mr. Driscoll, as an attorney for the Homestake people, I assume was also acting as your at-

(Testimony of Ira B. Joralemon.)

torney in working together with Mr. Conner in trying to clear up the [43] title defect?

Mr. Dolph: May I object to this line of questioning as not being material to any issue in the case.

The Court: What is the purpose of it?

Mr. McCarty: It is preliminary to certain of the acts thereafter taken by Mr. Driscoll. It goes somewhat to his agency. A lot of the things in this were done and signed by Mr. Driscoll. I am curious to know whether or not he was Mr. Joralemon's attorney.

The Court: He may answer that.

The Witness: Would you mind repeating the question?

Q. (By Mr. McCarty): In connection with clearing up the title defects, Mr. Driscoll was representing you as well as Homestake, I would take it? A. He was.

Q. In connection with attempting to negotiate a contract into final form out there on that lease option, I would assume he was your attorney as well as Homestake's? A. He was.

Mr. Dolph: We will stipulate that Mr. Driscoll was Mr. Joralemon's attorney, your Honor.

Q. (By Mr. McCarty): Do you recall how you found out that the cloud on the title had been cleared up?

A. I was told that by telephone and I don't remember whether it was Mr. Driscoll or who told me on the telephone. [44]

Q. At any rate, a little while after you went onto the property and started work?

A. Shortly thereafter.

Q. Getting back, Mr. Joralemon, to this letter of November the 5th, Plaintiff's Exhibit 4, I take it you had probably read the contract between you and Mr. and Mrs. Albert, that is the final contract which is in evidence as Plaintiff's Exhibit 3, I take it you had read that agreement before you signed it? A. I had read it.

Q. And I notice in here in your letter you pointed out that the $7,000 payment would be paid when due? A. Correct.

Q. It was due two days later or three days later? A. Right.

Q. I notice you also pointed out that the quit-claim deed specified in paragraph three would be sent as soon as practicable?

A. That is correct.

Q. I take it you took it to be your duty under the contract to send such a deed?

Mr. Dolph: I object to what he took to be his duty, your Honor. That is a question for the Court.

The Court: He may answer that.

Q. (By Mr. McCarty): You took it to be your obligation [45] under the lease to forward such a deed, right? A. Yes.

Q. What did you do to the end that such a deed be sent?

A. I called up—I called up somebody in the Homestake office, I am not sure whom, and had sent

(Testimony of Ira B. Joralemon.)

them a copy of my letter to Mr. Albert and asked if they would take care of the quitclaim deed.

Q. As a matter of fact, the person you talked to up there was Mr. Hamilton, wasn't it?

A. I think it was Mr. Hamilton.

Q. Who is Mr. Hamilton, who was he at that time?

A. He was secretary of Homestake Mining Company.

Q. He maintained his office there in San Francisco? A. He did.

Q. Within a day or two at the most of the date of this letter, November 5, 1956, you called Mr. Hamilton, the secretary of Homestake Mining Company, enclosing a copy of this and asking that he take care of the deed which you thought to be required, right? A. That is correct.

Q. Did you at any time subsequent to that time make any inquiry as to whether or not that had been done?

A. I did not, not until after receiving Mr. Conner's letter in April or May.

Q. All right, sir. I believe you have told us that Mr. Albert [46] called you November 16th—to refresh your recollection on that I will let you reexamine your letter of that date in which you refer to the telephone call of that date, so you strengthen your memory as to the dates.

A. Yes, that is correct.

Q. He did in fact call you November 16th?

A. He did.

(Testimony of Ira B. Joralemon.)

Q. And you recall there were two matters which were discussed on that day, number one is he wanted the drill logs? A. Yes.

Q. And number two, he expressed dissatisfaction as to the money which had been sent to him?

A. That is true.

Q. You at that time told him: "Well, Greenway, that is a matter for our lawyers to take care of"? A. Yes.

Q. And, "I can't pass judgment on whether we owe you anything or not," right?

A. That is right.

Q. As a matter of fact, you had left the matter of the apportionment of funds up to your attorneys?

A. Entirely.

Q. And when I say your attorneys, in particular Mr. Driscoll? [47] A. Yes, sir.

Q. It was his job to read the contract and decide what, if any, amount of money Greenway Albert had coming, that was Mr. Driscoll's job?

A. I would assume so.

Q. In doing it he would be doing it on your behalf and on behalf of Homestake. You did know at that time that Mr. Albert did claim that a failure on the part of you and your principal to comply with the terms of the contract with respect to the payment of money to him?

A. I knew he disagreed with the settlement.

Q. All right. You told Mr. Dolph that had you known something more had to be done to terminate this claim, you stood ready, willing and able to see

(Testimony of Ira B. Joralemon.)

it was done at any time? A. Surely.

Q. You knew there was a conflict about the money. Tell the Court what you did to the end that conflict be resolved, what did you do after Mr. Albert told you there was a conflict?

Mr. Dolph: I object on the ground the question is very confusing and there is an inference in it that Mr. Joralemon knew that they took the position that if the statement wasn't made there was no termination; that is contrary to what he has testified.

The Court: No, he may answer this as to what he did, [48] if anything, about settling the dispute about the money.

Q. (By Mr. McCarty): What did you do about settling the dispute about the money, if anything?

A. I did nothing. I left that up to the lawyers.

Q. Did you call Mr. Driscoll and tell him that Mr. Albert was dissatisfied?

A. I think I telephoned either Mr. Hamilton or Mr. Driscoll directly. Mr. Driscoll was traveling a lot of the time and hard to get. It may have been Mr. Hamilton.

Q. You mean about the same time?

A. About the same time.

Q. This letter that Mr. Conner wrote to Mr. Driscoll which is in evidence, you said you had seen that letter at some later date?

A. At some later date, that is correct.

Q. Was that after this letter of April that

(Testimony of Ira B. Joralemon.)

graphically called it to your attention there was some conflict in the deal?

A. It was after that. I don't remember when.

Q. This was pretty late in the matter you first saw this letter? A. It was.

Q. Did you ever see Mr. Driscoll's reply to it?

A. I don't think so.

Q. Let me ask you this, Mr. Joralemon, at any time after [49] your discussion—first I will ask you this, at any time after your letter of November 5, 1956, in which you gave notice of your intention to surrender or your notice of surrender, whatever the case may be, at any time after that time, what, if anything, did you do to bring about a revocation of the contract other than calling Mr. Hamilton and asking that the deed be sent and the money be transmitted, did you ever after that time do anything at all?

A. I did not. I assumed nothing else was necessary.

Q. You of course relied on Mr. Hamilton to get the deed out and relied on your attorneys to get the proper amount of cash down here?

A. That is correct.

Q. I suppose you were somewhat astounded when you got Mr. Conner's letter of April 16th calling your attention to the fact that no deed had ever been sent?

A. I was very much surprised that Greenway Albert had not let me know of it earlier.

(Testimony of Ira B. Joralemon.)

Q. Were you surprised the secretary of Homestake Corporation hadn't let you know?

A. Yes, I was surprised I had heard nothing about it from anybody.

Q. Were you surprised that your attorney hadn't told you about the conflict with respect to the money?

A. No. That wasn't my business, that was their business. [50]

Q. Were you aware of the fact they had written a letter early in January acknowledging their mistake with respect to the money?

A. I did not know that.

(Defendants' Exhibit C marked for identification.)

Q. (By Mr. McCarty): Look at this C for identification. I think you recognize the letterhead of the Homestake Mining Company?

A. That looks like it.

Q. Would you take that to be the valid signature of Mr. Hamilton by his representative?

A. It looks like it.

Mr. McCarty: We will offer that into evidence. Do you object, gentlemen?

Mr. Dolph: I don't see any materiality. We have no objection to the exhibit.

The Court: It may be received.

(Defendants' Exhibit C marked in evidence.)

(Testimony of Ira B. Joralemon.)

DEFENDANTS' EXHIBIT C

Homestake Mining Company
100 Bush Street
San Francisco 4, California

January 4, 1957.

Mr. H. Greenway Albert,
P. O. Box 246,
Tombstone, Arizona.

Subject: Project—Greenway Albert

Dear Mr. Albert:

Enclosed is our check no. 12-126, in the amount of $1,286.52, payable to H. Greenway Albert or Maja Greenway Albert.

This check is in addition to our payment dated November 6, 1956, check no. 11-5 in the amount of $3,932.15, and covers an error made in computation.

Sincerely yours,

/s/ J. W. H.,

JOHN W. HAMILTON,
Secretary.

By /s/ M. A. MASON.

JWH:mam:js
encl.

Admitted in evidence February 21, 1958.

(Testimony of Ira B. Joralemon.)

Q. (By Mr. McCarty): This letter of January 4, 1957, addressed to Mr. Albert here, coming out of Mr. Hamilton's office, refers to the fact it encloses a check in the sum of $1,286.52, and says that it covers an error made in the computation. Did anybody at any time ever tell you about that error in computation?

A. They did not, not until after this question come up [51] in April or May.

Q. Did anybody ever bother to tell you Mr. Greenway Albert was not paid all of the quarterly payment, either according to your own views, until January of the next year?

A. Not until long afterward.

Q. Not until the dispute was crystallized by Mr. Conner's letter of April 16th; you never answered Mr. Conner's letter of April 16th?

A. I did not.

Q. As a matter of fact, a month later you got a letter from Mr. Conner, a registered letter in which he asked that you answer? A. That is correct.

Q. You recall that?

(Defendants' Exhibit D marked for identification.)

Q. (By Mr. McCarty): Mr. Joralemon, as far as this letter of April 16th, which is in evidence now as Plaintiff's Exhibit 7, I think you told us you never answered that letter?

A. That is true.

Q. You recall you got a subsequent letter one

(Testimony of Ira B. Joralemon.)

month later, May 16th, from Mr. Conner suggesting you answer? A. That is correct.

Q. This is Defendants' Exhibit D for identification is your answer to Mr. Conner's letter of April 16th and May 16th, [52] right?

A. That is correct.

Mr. McCarty: We offer that in evidence.

Mr. Dolph: No objection.

The Court: It may be received.

(Defendants' Exhibit D marked in evidence.)

DEFENDANTS' EXHIBIT D

May 21, 1957.

Mr. Charles E. Conner,
509 Valley National Building,
Tucson, Arizona.

Dear Mr. Conner:

In reply to your letters of April 16 and May 16 re "Lease and Option to Purchase," this matter is being handled for us by Mr. Robert E. Driscoll Jr. Mr. Driscoll was to have looked you up in Tucson a week or ten days ago.

Of course we consider that my letter of cancellation of the Lease and Option from H. Greenway Albert was valid. Therefore we are convinced that no other payments are due to Mr. Albert.

If Mr. Driscoll has been unavoidably delayed and has not gotten in touch with you before now, he will certainly do so very shortly.

(Testimony of Ira B. Joralemon.)

Yours very truly,

/s/ IRA B. JORALEMON.

IBJ:B

cc: Dr. Donald H. McLaughlin
Mr. R. E. Driscoll Jr.

Admitted in evidence February 21, 1958.

Q. (By Mr. McCarty): I notice in here you refer to the fact that you thought Mr. Driscoll was to have seen Mr. Conner at a previous date, so from that I would assume after you received Mr. Conner's letter of April 16th you contacted, among other people, Mr. Driscoll?

A. Either Mr. Hamilton or Mr. Driscoll.

Q. Certainly before you wrote that letter someone had told you that Mr. Driscoll was going to contact Mr. Conner? A. I would think so.

Q. Do you recall how soon after the receipt of the letter you contacted Mr. Hamilton or Mr. Driscoll? A. Very shortly.

Q. A matter of a few days? A. Few days.

Q. Incidentally, to completely break our chain of thought, was that letter of November 5 either registered or certified?

A. I don't know. I left that to my secretary. I don't know what she did with it. [53]

Q. Does she customarily show on the face of her letters whether or not they are to be registered or

(Testimony of Ira B. Joralemon.)

certified? A. Not always, no.

Q. You have no way of knowing at this date whether it was?

A. I have no way of knowing.

Q. With respect to the institution of this suit we are here on now, Mr. Joralemon, have you ever read the complaint in the case?

A. I don't think so, not in detail.

Q. You probably do remember that sometime toward the latter part of May you were requested to sign a quitclaim deed by your attorneys?

A. That is correct.

Q. Where was that done, here or in San Francisco? A. In San Francisco.

Q. Did you come down here at all on the deal?

A. Not at that time.

Q. Your attorneys had you execute a quitclaim deed, and that was the latter part of May, right?

A. Approximately.

Q. I will tell you in the complaint there are references to letters that were mailed to Mr. Bilby's office, moneys that were deposited with the Valley National Bank, deeds that were served, and so on, that was all left in the hands [54] of your attorneys, I take it? A. That is true.

Q. Mr. Driscoll, and through him this Tuscon law firm? A. Right.

Mr. McCarty: I have no further questions.

(Testimony of Ira B. Joralemon.)

Redirect Examination

By Mr. Dolph:

Q. Mr. Joralemon, how long have you known Mr. Albert?

Mr. McCarty: I object on the ground it is immaterial.

Mr. Dolph: It is not immaterial, your Honor. There is a question of estoppel here and a question of whether Mr. Joralemon was entitled to rely upon Mr. Albert's failure to make a demand.

The Court: I will let him answer.

A. Since approximately 1912.

Q. (By Mr. Dolph): Are you personal friends as well as business acquaintances? A. Yes.

Mr. Dolph: That is all.

Mr. McCarty: That is all.

ROBERT E. DRISCOLL, JR.

called as a witness herein, having been first duly sworn, [55] testified as follows:

Direct Examination

By Mr. Dolph:

Q. What is your full name and what is your business or profession?

A. Robert E. Driscoll, Jr. I am an attorney.

Q. Where? A. Lead, South Dakota.

Q. You have heard Mr. Joralemon's testimony here. Were you acting as an attorney and as attor-

(Testimony of Robert E. Driscoll, Jr.)

ney for his partner or grubstake contractor at the time this was all going on?

A. I was, yes, sir.

Q. On or about April 28th, 1956, did you come to Tucson, Arizona?

A. That is approximately the date, yes.

Q. I hand you Exhibit 1 in evidence. Do you recognize that?

A. I have seen it before, yes.

Q. You had seen it before you came here on April 28th, is that correct?

A. I either saw this or a copy.

Q. What was the purpose of your coming here at that time?

A. I came down with the idea of talking with Mr. Albert's [56] attorney about the various title problems and also to formalize this memorandum.

Q. Did you get to talk to Mr. Albert's attorney?

A. I did, yes.

Q. Who was that? A. Mr. Conner.

Q. You discussed the matter of the title defects with him? A. I did.

Q. Did you have any kind of an understanding as to the preparation of any further agreement or supplement to agreement to Exhibit 1 in evidence?

A. This was a Saturday morning——

Mr. McCarty: Just a moment, please. I am not going to object to his telling what they did, but I object to any agreement to make an agreement. We have a parol evidence rule. I don't have any objection at all if the witness tells us what happened.

(Testimony of Robert E. Driscoll, Jr.)

Mr. Dolph: He was asked if he had an understanding.

The Court: He may answer.

Mr. McCarty: I didn't want to get a parol agreement in here.

The Witness: I will try to avoid that.

I met with him and we discussed the various ramifications, title-wise, and he couldn't work Saturday afternoon, and as I [57] recall, he was going to be gone Monday. I told him I would prepare and try to find a public secretary to type up my proposal for the memorandum agreement. I went back to my hotel room and drew this agreement that afternoon in longhand. I was unable to find a secretary.

(Plaintiff's Exhibit 8 marked for identification.)

Q. (By Mr. Dolph): I hand you Exhibit 8 for identification and ask you if that is what you prepared? A. That is what I prepared, yes.

Q. Did you turn that over to Mr. Conner?

A. I either mailed it or went up and dropped it in his office door, yes.

(Plaintiff's Exhibit 9 marked for identification.)

Q. (By Mr. Dolph): I hand you Exhibit 9 for identification and ask you if you recognize that?

A. That was my handwritten letter that accompanied the agreement, yes.

Q. You left both of those at Mr. Conner's office?

(Testimony of Robert E. Driscoll, Jr.)

A. I either mailed them or left them, I don't recall which.

Mr. Dolph: I offer 8 and 9 in evidence.

Mr. McCarty: 8 is the suggested memo?

Mr. Dolph: Yes, and 9 is the letter.

Mr. McCarty: I have no objection to either.

The Court: Plaintiff's Exhibits 8 and 9 in evidence. [58]

(Plaintiff's Exhibits 8 and 9 marked in evidence.)

Q. (By Mr. Dolph): Subsequent to that, did Mr. Conner contact you or confer with you regarding the subject matter of Exhibit 8 in evidence?

A. No, he then prepared a typed instrument somewhat along the lines there with some rather major changes. He sent out a copy I recall to Mr. Joralemon and sent a copy to my office, but I was in the field and it was sometime before I read it. But Mr. Conner did prepare an agreement that was ultimately executed.

Q. I hand you Exhibit 2 in evidence and ask you if that is the agreement Mr. Conner prepared?

A. Yes, that is it.

Q. Did he confer with you about any changes between Exhibit 8 and Exhibit 2, before Exhibit 2 was executed? A. He did not.

Q. I hand you Exhibit 6 in evidence and ask you if you ever saw that, Mr. Conner's letter to you?

Mr. McCarty: I object on the ground it is im-

(Testimony of Robert E. Driscoll, Jr.)

material as to whether or not he saw that letter to him. I am interested in knowing whether or not he received it, but I think it is wholly immaterial. Are they trying to set aside an agreement here? I don't know what their point is in all this.

The Court: I am going to let him answer. I don't know what it is leading up to but I can tell better when we [59] get a little further.

A. Yes, it is a letter addressed to me by Mr. Conner that I received.

Q. (By Mr. Dolph): Did you answer the letter? A. As I recall, I did.

(Plaintiff's Exhibit 10 marked for identification.)

Q. (By Mr. Dolph): I hand you Plaintiff's Exhibit 10 for identification and ask you if that is your response to Mr. Conner's letter of November 21st? A. It is.

Mr. Dolph: I offer 10 in evidence.

Mr. McCarty: I have no objection at all, save and except the objection with reference to the parol evidence rule. I make that limited objection, that the Court receive it subject to my objection insofar as it bears to the parol evidence rule. There is some reference in there to a telephone conversation with respect to the $4,000 payment, but the Court has indicated he will not hear parol evidence on it.

Mr. Dolph: Let us stipulate that no parol evidence from either side will be received. I am willing to do that.

(Testimony of Robert E. Driscoll, Jr.)

The Court: You don't need to stipulate, I am not going to do it anyway in view of counsel's agreement that it is ambiguous.

Mr. Dolph: I offer it subject to that limitation. [60]

The Court: It may be received with that limitation.

(Plaintiff's Exhibit 10 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 10

Kellar & Kellar & Driscoll
Attorneys at Law
Lead, South Dakota

November 26, 1956

Mr. Charles E. Conner,
Attorney at Law,
P. O. Box 310,
509-514 Valley National Building,
Tucson, Arizona,

Re: Homestake Mining Company—
H. Greenway Albert

Dear Sir:

I have your letter of November 21st re the above-captioned matter. Said letter has been referred to Mr. John Hamilton of the Homestake Mining Company, 100 Bush Street, San Francisco 4, California, who made the computations as to the amount due Mr. Albert.

(Testimony of Robert E. Driscoll, Jr.)

I would like to state that insofar as the writer is concerned, it was not distinctly understood that the $4,000 settlement cost was not to be charged against Mr. Albert. To the contrary, it was and is my understanding and opinion that said payment was a part of the legal cost of clearing up title to Mr. Albert's property, to be deducted on a pro rata basis for a year's payment as they became due, pursuant to the terms of the contract. There may have been such an understanding amongst others who negotiated and worked on this agreement that I know nothing about, but this will have to be checked.

Also, the writer has had to assume the blunt of the blame for allowing the execution of the contract contrary to the basic original intent insofar as the requirement of the first quarterly payment of $7,000 was concerned. The intent as set forth in the initial memorandums would have allowed cancellation of the option prior to such payment. The drafts you sent to Mr. Joralemon for signature provided for a 90-day notice prior to cancellation. This blame may be mine to assume, but to check my recollection on it, I would appreciate your sending me by return mail the tentative instrument I prepared in long hand on yellow legal pad paper and left with you when I was in Tucson some months ago. In the alternative, I would appreciate it if you would send me a true copy of said instrument.

(Testimony of Robert E. Driscoll, Jr.)

You will no doubt be hearing from San Francisco either direct or through this office in the near future.

Very truly yours,

/s/ R. E. DRISCOLL, JR.

RED:d

Admitted in evidence February 21, 1958.

Mr. Dolph: We have no further questions.

Cross-Examination

By Mr. McCarty:

Q. Mr. Driscoll, did you by any chance bring your correspondence file down here with you?

A. I have some of it, yes.

Q. Where is the part of it you don't have?

A. It is mixed up between my file and the file of Mr. Bilby.

Q. Would it be a great deal of trouble now for you to go get your correspondence file, please?

(Defendants' Exhibit E marked for identification.)

Q. (By Mr. McCarty): Now, marked for identification, Exhibit E, is a copy of a letter which purports to have been sent by Mr. Conner to you under date of May 16, 1956, in which he states he is enclosing a copy of a memorandum agreement,

(Testimony of Robert E. Driscoll, Jr.)
which it is my understanding is that agreement you have already seen. Do you have the original of that in your file?

A. I am not sure, but to save time I will admit I got this letter.

Q. You don't know whether you have the original in your file? [61]

A. I am not sure. I know I received that letter with the proposed agreement. It was on my desk when I got back.

Mr. McCarty: I offer that into evidence.

Mr. Dolph: No objection.

The Court: It may be received as E in evidence.

(Defendants' Exhibit E marked in evidence.)

DEFENDANTS' EXHIBIT E

May 16, 1956.

Mr. R. E. Driscoll, Jr.,
Kellar, Kellar & Driscoll,
Attorneys at Law,
215 West Main Street,
Lead, South Dakota.

Dear Mr. Driscoll:

We are enclosing you herewith a copy of the Memorandum Agreement and a copy of our letter to Mr. Joralemon.

Trusting that you will find the enclosed agreement in order, we are,

(Testimony of Robert E. Driscoll, Jr.)

Yours very truly,

CONNER & JONES,

By.....

CEC/vsb
Enclosures

Admitted in evidence February 21, 1958.

Q. (By Mr. McCarty): I have in my file before me, Mr. Driscoll—and it contains Mr. Conner's correspondence file—and according to my file the next letter you wrote to Mr. Conner is dated May 29th, 1956. A. Yes.

Q. I wonder if you have any record of having written one before that day?

A. May 21st, 1956.

Q. May 29th is the date of this letter. My question is, specifically, if you have any record of any correspondence between you and Mr. Conner between May 16 and May 29? First, let me ask you, did you answer that letter of May 16th?

A. I don't recall. That is what I am trying to find out. Yes, I have a copy of a letter I wrote to Mr. Conner on May 29th.

Q. That is the next correspondence from you to him, right? This original I have marked F for identification, is that the original? [62]

A. Yes.

(Testimony of Robert E. Driscoll, Jr.)

DEFENDANTS' EXHIBIT F

Kellar & Kellar & Driscoll
Attorneys at Law
Lead, South Dakota

May 29, 1956.

Mr. Charles E. Conner,
Attorney at Law,
Box 310,
Tucson, Arizona.

Dear Mr. Conner:

Sometime ago when we were discussing a quiet title action on property recently acquired by Mr. Joralemon from the Alberts, I wrote asking if you could ascertain whether the ground was open ground.

I have not as yet heard from you and thought I would jog your memory as to this.

We would also like to be posted from time to time as to progress of the quiet title action.

Very truly yours,

/s/ R. E. DRISCOLL, JR.

RED:d

[Written in pencil at foot of letter]: Not open for location.

Marked for identification February 21, 1958.

(Testimony of Robert E. Driscoll, Jr.)

Mr. McCarty: I offer it in evidence.

Mr. Dolph: May we see it?

Mr. McCarty: Oh, yes.

Mr. Dolph: I object to the materiality.

The Court: May I see it, please?

Mr. McCarty: Before your Honor takes a look at it, I wonder if your Honor would like to hear the theory upon which I am offering it?

The Court: If I see the letter I may be able to follow your theory.

Mr. McCarty: They asked Mr. Driscoll some questions awhile ago whether or not Mr. Conner had consulted with him before he prepared the memo of May 21 or 16th, whatever it is, and whether or not he made substantial changes without consulting him. And I rather got a strong inference they were attempting to show that Mr. Conner had, without consulting Mr. Driscoll, gone out and made an entirely different deal for the people. That was the inference I thought they might be trying to get across to the Court. I thought the Court might be interested in seeing that as far as the correspondence is concerned, there was no remonstrance ever made about it.

Mr. Dolph: That is not material for that.

Mr. McCarty: As long as the Court didn't get the [63] inference, I agree it isn't material.

The Court: The objection is sustained.

Q. (By Mr. McCarty): Mr. Driscoll, when you came down here first to see Mr. Conner May 28th, you recall you left in his hands a draft of a lease

(Testimony of Robert E. Driscoll, Jr.)

and option to purchase, which you had prepared, that being a thing which you were called upon to prepare with some frequency, do you recall that?

A. As I recall, my first visit here a Mr. Paul Henshaw, one of our geologists, was along, and an instrument which had been prepared by other counsel and myself was presented to Mr. Conner, as I remember.

Q. That was the 28th of April when that was done? A. I think so, yes.

Q. As a matter of fact, your handwritten letter of that day will probably help you refresh your recollection, if you will read the last sentence of the third paragraph. A. Yes, I remember that.

Q. You remember leaving a draft you had prepared?

A. That is the longhand draft I left.

Q. No. Read the paragraph again.

A. You want me to read it aloud?

Q. Would you, please.

A. This letter was attached to my longhand memorandum agreement, it said: "If you desire any major changes I [64] would appreciate your calling me at my office in Lead Monday. Also after you have had a chance to digest the principal contract, I would appreciate hearing from you with comment."

Q. What did you mean by "principal contract?"

A. I think I meant that one.

Q. That was what I was asking you about.

A. That was the one that was prepared in San

(Testimony of Robert E. Driscoll, Jr.)

Francisco that we had to change because of the title problems.

(Defendants' Exhibit G marked for identification.)

(Defendants' Exhibit F marked for identification.)

Q. (By Mr. McCarty): Does that look like what you left with him, is that your handwriting on the face of it? A. No.

Q. Do you know whose it is?

A. I think it is Paul Henshaw's.

Q. Do you think that is what you left with Mr. Conner to digest?

A. I wouldn't be surprised. I know we left an instrument, I think this is probably it. If you say so it is.

Q. I don't know. I strongly believe it to be, but I wasn't there.

A. Yes, this instrument was prepared in San Francisco by other counsel and I saw it the first time on that day and we left a copy of it with Mr. Conner.

Mr. McCarty: I offer it in evidence. [65]

Mr. Dolph: May I ask the witness a question concerning this? Was this instrument ever signed?

The Witness: No.

Mr. Dolph: We object to it upon the ground it is immaterial, your Honor.

The Court: What is the purpose of it, Mr. McCarty?

(Testimony of Robert E. Driscoll, Jr.)

Mr. McCarty: If the Court has any question concerning the latter ambiguity that I referred to with respect to the two cancellation provisions in the contract, I think the Court might have received some assistance from the historic preparation of the instrument in its final form. I don't think that will give the Court any trouble, but in excess of caution I thought I would put it all before the Court.

The Court: I had the view there is an ambiguity between 3 and 13.

Mr. McCarty: That is the ambiguity I am referring to and I believe the historical preparation of the documents from one to the last one will shed some light upon it, which will assist the Court in his interpretation of it.

The Court: I don't know whether this document will be—for that purpose I will receive it, for whatever help it may give in resolving the ambiguity. It will be considered only for that purpose.

Mr. McCarty: That is the only purpose I have in offering it. [66]

(Defendants' Exhibit G marked in evidence.)

Q. (By Mr. McCarty): You recall after you were down here in April and talked to Mr. Conner, that thereafter a quiet title action was instituted against the Uranium people? A. Yes.

Q. I believe that you remember the matter was settled about the middle of August? A. Yes.

Q. And a check issued out of the Homestake

(Testimony of Robert E. Driscoll, Jr.)

office in Lead, South Dakota, payable to the order of Conner and Jones in the sum of $4,000?

A. Yes.

Q. I will show you the voucher I have here of the thing which will probably help you out with respect to the date. I will mark it in evidence if you want it marked. A. August 17th.

Q. August 17th is the true date, right?

A. Yes.

Q. On that date the settlement funds were transmitted to Conner and Jones in Tucson?

A. Yes.

Q. Can you tell now from your file when you prepared a lease and option to purchase embodying what you thought should be the final agreement between these people? Have you any way of telling when that was prepared by you? [67]

A. The first instrument that just went into evidence was prepared in San Francisco. The memorandum agreement, the next memorandum agreement was prepared by Mr. Conner——

Q. Now——

A. Just a minute, I am not through.

Q. You are referring to the one of May?

A. Right.

Q. Right.

A. The next agreement was prepared here I believe after Mr. Joralemon came down and had a further conference with Mr.——

Q. Down here, meaning where?

A. Down to Tucson.

(Testimony of Robert E. Driscoll, Jr.)

Q. You say the next one was prepared down here?

A. Yes, it was prepared in Tucson.

Q. By whom? A. That I don't know.

Mr. McCarty: Can you help me on that?

Mr. Joralemon: Mr. Albert agreed on changes in the May agreement and it was copied in.

The Witness: I have it on good authority Mr. Conner prepared it.

Q. (By Mr. McCarty): Check your correspondence file and see if you find a letter from you to Conner dated August 25th.

A. August 25th? [68]

Q. Yes.

(Defendants' Exhibit H marked for identification.)

Q. (By Mr. McCarty): Mr. Driscoll, as a matter of fact, you sent a proposed agreement to Mr. Conner August 25, 1956, right? A. Yes.

Q. I think you will be the first one to tell the Court that this document, which is Plaintiff's Exhibit 3 in evidence, was typed in your office by your typewriter—that is a rather distinctive type you people use up there, isn't it?

A. We have so many I don't know.

Q. Compare it, for instance, with your letter, with your signature on it and see if that assists you?

A. Yes. This is the one that took out the 90-day

(Testimony of Robert E. Driscoll, Jr.)

cancellation clause. That was apparently prepared up there.

Q. For instance, take a look at this photostat I have here.

(Defendants' Exhibit I marked for identification.)

Q. Is there any way of telling from your file whether this Defendants' Exhibit I for identification is a copy of the draft you sent to Conner August 25th?

A. Yes, I think this is a copy of it.

Q. You haven't any doubt that is a photostat of an instrument prepared in your office?

A. I think that is right. [69]

Q. That typing is pretty distinctive, isn't it?

A. I am pretty sure it is right.

Mr. McCarty: We offer that in evidence. If you would like, I can use the one we had on deposition. I wonder if I might withdraw this document marked Defendants' Exhibit I and substitute a typed copy with the same marking?

The Court: Very well.

Mr. McCarty: This will probably be a little easier to handle.

The Witness: Yes.

Q. (By Mr. McCarty): You believe that to be a copy of the document you sent to Mr. Conner?

A. I believe so.

Mr. McCarty: We offer it in evidence.

(Testimony of Robert E. Driscoll, Jr.)

Mr. Dolph: We object to it on the grounds it is immaterial, your Honor.

Mr. McCarty: I have the same limited purpose in mind, if the Court please.

The Court: Does this have the 3 and the 13 in it as it was finally signed?

While you are looking at that we will take the noon recess, Mr. McCarty, until 1:30.

(Noon recess.) [70]

After Recess—1:30 o'Clock P.M.

Mr. McCarty: I believe I have offered this into evidence. This is Defendants' Exhibit I for identification, it being the contract that Mr. Driscoll has identified the one as being sent to Mr. Conner August 25th.

The Witness: I would like to examine that a moment, if I may.

Mr. McCarty: All right, sir.

The Court: Is that I for identification?

Mr. McCarty: Yes, sir.

Mr. Dolph: Our objection is to the materiality of it, your Honor.

The Court: May I see it a moment, please?

Mr. McCarty: I think a chronological sequence of the appearance of these documents would be of some assistance to the Court, in connection with the ambiguity which the Court has indicated he believes exists.

The Court: It will be received. I can't deter-

(Testimony of Robert E. Driscoll, Jr.)
mine now if it will be of any aid in resolving or helping me with the ambiguity I see in the agreement, but it will be disregarded in the event it doesn't.

(Defendants' Exhibit I marked in evidence.)

Q. (By Mr. McCarty): Mr. Driscoll, do you now recall that sometime early in September of the year 1956 Mr. Joralemon came [71] to Tucson, Arizona, for the purpose of discussing this?

A. Yes. I am not sure as to the date, but I know he did come down.

Q. I can call Mr. Joralemon back if necessary to verify the fact—perhaps you remember his testimony on deposition.

(Defendants' Exhibit J marked for identification.)

Q. (By Mr. McCarty): You recall his testifying on deposition he was here September 11th and talked to Mr. Greenway Albert? A. Yes.

Q. And they went over a draft of the lease?

A. Yes.

Q. He testified that in fact that handwriting on top of that exhibit is he and Mr. Joralemon's handwriting? A. Yes.

Q. You recall his testimony in that regard?

A. Yes.

Q. I wonder if you would look at your file and see if you have any record of having transmitted that draft to Mr. Joralemon sometime the latter part of August, or early part of September?

(Testimony of Robert E. Driscoll, Jr.)

A. I do have a letter addressed to Mr. Paul Henshaw, interoffice communication, sending an original and four copies.

Mr. McCarty: Let's mark that for identification.

(Defendants' Exhibit K marked for identification.) [72]

The Witness: Let me look at that.

Mr. McCarty: Would you, please.

Now I will offer this Defendants' Exhibit J into evidence.

Mr. Dolph: We object to it on the grounds of materiality and no proper foundation has been laid.

The Court: I didn't get that this witness had identified it.

Mr. McCarty: He recalls Mr. Joralemon having identified it. I can tell you that I will call Mr. Joralemon back and I will put him back on the stand for that purpose. That is his handwriting on it? A. Yes, it is.

Mr. McCarty: I will call Mr. Joralemon back.

Q. (By Mr. McCarty): This memorandum to Mr. Henshaw, Mr. Henshaw is in the San Francisco office? A. Yes.

Q. What is he, an attorney?

A. No, he is a geologist.

Q. You said enclosed is an original and four copies of the agreement. "I checked this with Joralemon by telephone, he stated it is in order." Assuming it to be the fact, which I think you have

(Testimony of Robert E. Driscoll, Jr.)

testified you know to be a fact, Mr. Joralemon and Mr. Albert had discussed the matter in Tucson?

A. Yes. [73]

Q. I would assume following the discussion you received some sort of telephone call from Mr. Joralemon?

A. And the discussion was on cancellation clause with a payment—somebody told me what they had decided to do, yes.

Q. I notice some notes were made on that. Somehow that came to your attention after their person to person talk? A. Yes, it did.

Q. Judging from the dates, I would say you immediately sat down and got the thing in final form within two days and had it in the mail to San Francisco?

A. It would be my assumption.

Q. I notice the executed agreement which is in evidence was executed by the Greenway Alberts here in Tucson the 21st day of September, which would indicate it was forwarded very shortly out of the San Francisco office to Tucson. That date is the 13th of September; it was executed the 21st of September?

A. What was the date of the meeting of Mr. Joralemon with Mr. Albert?

Q. 11th. That would seem to follow?

A. Yes.

Q. This document which was actually executed by the parties is no doubt one of the copies which

(Testimony of Robert E. Driscoll, Jr.)

was mailed out of your office with your letter of September 13th?

The Court: You are referring to 3? [74]

The Witness: I am referring to Plaintiff's Exhibit 3, yes, sir.

What was that question?

Q. (By Mr. McCarty): I said that document is one of the documents referred to in this Defendants' Exhibit K for identification?

A. That is not our typing that you refer to as being so distinctive, so I doubt that particular copy came out of my office.

Q. You want the Court to believe they executed a copy you did not prepare?

Mr. Dolph: I object to that.

The Court: Objection sustained.

The Witness: This is undoubtedly a copy of the agreement, but I don't think that particular one came out of my office.

Q. (By Mr. McCarty): Do you suppose they could have retyped it in San Francisco?

A. They may have.

Q. Do you have any way of knowing that is an identical copy of one of the instruments you referred to in your memorandum of September 13th?

A. Let me have—that is it.

Q. What I claim to have Mr. Joralemon's handwriting?

The Court: This I? [75]

The Witness: That is it, sir. I don't know.

Q. (By Mr. McCarty): You have no way of

(Testimony of Robert E. Driscoll, Jr.)

telling the Court whether or not this executed contract, Plaintiff's Exhibit 3 is in fact a copy of the contract which you mailed to Mr. Henshaw September 13th?

A. I don't know for sure. It probably is, but I don't know.

Q. That would certainly seem to be a reasonable presumption in the light of the fact Mr. Joralemon signed it? A. Yes, it would.

Mr. McCarty: I offer into evidence the memo of September 13th, if the Court please.

Mr. Dolph: The only objection is to the materiality of it.

The Court: May I see it? It may be received.

(Defendants' Exhibit K marked in evidence.)

DEFENDANTS' EXHIBIT K

Homestake Mining Company
Correspondence—Inter-office

To: Paul C. Henshaw.
From: Kellar & Kellar & Driscoll.
Date: September 13, 1956.

Dear Paul:

Enclosed herewith original and four copies of proposed agreement with Alberts. I checked this with Joralemon by telephone last night, and he stated that it was in order, but I would appreciate you carefully going over the contract and discus-

(Testimony of Robert E. Driscoll, Jr.)

sing it with Mr. Joralemon if you have any questions.

Mr. Joralemon stated that he would be back in San Francisco Friday and in his office Saturday morning, and would then be gone for awhile, and I am therefore sending this airmal special with the hope that you can catch him before he leaves.

I have not sent a copy of this to Conner, and do not intend to do so until this has been approved by you people out there. Suggest the possibility after your approval of sending executed copies directly to him.

Best regards.

Very truly yours,

R. E. DRISCOLL, JR.

RED:d

Admitted in evidence February 21, 1958.

Q. (By Mr. McCarty): Mr. Driscoll, I believe you told the Court in your talk with Mr. Joralemon the chief topic of your discussion was the right to terminate the lease and the provisions in the contract in that regard, right? A. Yes, sir.

Q. The memorandum of May 16th which Mr. Conner has prepared and which Mr. Joralemon knows he signed in San Francisco five or six days after the date on it, that provided for a ninety-day

(Testimony of Robert E. Driscoll, Jr.)

notice? [76] A. Yes, sir.

Q. No doubt you are aware of the fact that a quarterly payment of $7,000 was going to come due every three months? A. Yes.

Q. I believe you objected to the inclusion in that contract of that ninety-day notice, right?

A. It was signed up before I got to it, yes, and I did object to it strenuously.

Q. At the time you intended to put the thing into final form, I believe it was suggested to you by way of compromise that ninety-day clause be deleted from the contract and that in lieu thereof the contract provide it could not be terminated until the first quarterly payment had been made?

A. That is right.

Q. As a matter of fact, Mr. Joralemon instructed you to prepare along those lines, to delete the ninety-day clause and insert in lieu thereof a provision that the right of cancellation couldn't be exercised until the first quarterly payment of $7,000 had been made?

A. That I never put into any of the drafts I sent forward.

Q. Did you ever see that in any draft?

A. Not until the final execution after Mr. Joralemon's trip over here.

Q. Your testimony is you never did see the draft Mr. Joralemon executed? [77]

A. I don't believe so, I mean until after it was executed.

(Testimony of Robert E. Driscoll, Jr.)

Q. What did you mail out of your office May 13th?

A. They were in a big dispute about this particular feature and I apparently had some copies made deleting the ninety-day clause.

Q. Putting what in lieu of it?

A. I don't recall.

Q. A $7,000 payment to be made?

A. No. That was done down here, I tried to tell you that.

Q. Your testimony is you sent to San Francisco the 13th, you have no idea where they are or provide in that regard and you can't tell the Court what is in it?

The Court: You referred to that awhile ago as May 13th; you mean September 13th?

Mr. McCarty: September 13th, I am sorry.

A. I just don't recall.

Q. (By Mr. McCarty): You know that some eight days later the contract was here in Tucson and executed by the Alberts, some contract?

A. Was it executed at the time Mr. Joralemon was over here?

Q. I doubt it, now that you ask me. He was here the 11th. Did anyone at any time ever mention to you the fact that that first quarterly payment would have to be made? [78]

A. To cancel, yes.

Q. Who mentioned that to you, Mr. Joralemon?

A. In the first instance I don't believe so.

(Testimony of Robert E. Driscoll, Jr.)

Q. Prior to the execution of the contract, did Mr. Joralemon ever discuss that with you?

A. Execution of the final contract?

Q. Yes.

A. Somebody did. They told me they compromised it out by assuring the first payment would be made.

Q. As far as the intention of the people you represent was concerned, did you ever have any doubt it was their intention to include such a provision in the contract as a condition to the right to cancellation?

A. Would you repeat that question?

Q. By the time this thing got ready to sign, did you have any doubt at all with regard to the intention of your clients that the payment of the $7,000, subject to appropriate adjustments, was a condition precedent to the right to terminate?

A. It is not in that.

Q. You say it is not in this?

A. The payment of the first quarterly——

Q. Yes.

A. The first quarterly payment, yes, that is correct.

Q. That was made a condition precedent? [79]

A. That was made a condition to the——

Q. To the right to cancel?

A. To the right to cancel.

Q. As far as you knew——

Mr. Bilby: Just a minute now. We object to these conclusions. That is purely a legal conclusion.

(Testimony of Robert E. Driscoll, Jr.)

He can tell what is in the contract, not what its conditions precedent to the right to cancel. I don't believe the witness means to testify to any such thing.

The Witness: As I understand it, the payment of the first quartely $7,000 due——

Q. (By Mr. McCarty): Yes, sir.

A. ——had to be made before Mr. Joralemon could back away from this contract.

Q. You never had any doubt in your mind about that did you? A. No.

Q. As far as you know that was certainly Mr. Joralemon's intentions?

A. Exactly. It was after he got into the row, yes.

Q. I understand that. But I mean when you were getting ready to sign the thing? A. Yes.

Q. That was the precise intention of Mr. Joralemon? A. Right. [80]

Q. You never had the slightest doubt that was his intention or the intention of Homestake working through him, did you?

A. I can't really say what his intention was.

Q. All I can judge by is what he suggested you do, based on the instructions you got.

Mr. Dolph: We object to the form of the question, if the Court please. Let him ask what he was told to do.

The Court: I think the objection is good. It will be sustained.

Q. (By Mr. McCarty): Now getting back to

(Testimony of Robert E. Driscoll, Jr.)

this letter of November 5. You no doubt will recall receiving from Mr. Conner this letter which is now in evidence as Plaintiff's Exhibit 6, I have no doubt you remember that? A. Yes.

Q. And I suppose that you also remember your reply to that letter, which is here in evidence somewhere? A. Yes, I do.

Q. As Plaintiff's Exhibit 10. A. Yes.

Q. You sent that letter and that is your signature of course? A. Yes.

Q. Now, from what Mr. Joralemon has already told us, I take it you were never called upon to [81] exercise any function at all with respect to the preparation of the quitclaim deed referred to?

Mr. Bilby: I can hardly hear you.

The Court: Mr. McCarty, if you will stand back.

Q. (By Mr. McCarty): Nothing was ever said to you with respect to your preparation of the deed, I take it? A. No.

Q. What did you do, Mr. Driscoll, after you got Mr. Conner's letter, other than write him this reply of November 26th which closes with the words: "You will no doubt be hearing from San Francisco either direct or through this office in the near future."

A. I caught an error in the San Francisco computations.

Q. When did you do that?

A. After I got Mr. Conner's letter, then I wrote them about it.

Q. You wrote San Francisco? A. Yes.

(Testimony of Robert E. Driscoll, Jr.)

Q. You never again wrote Mr. Conner?

A. I don't believe so, no.

Q. When did you write San Francisco?

A. It was shortly after I received the letter from Conner.

Q. Why don't you look at your file and see if you can tell us from your documents? [82]

A. What is the date?

Q. The date on this letter you signed is November 26th, 1956.

A. Yes, I wrote this on the 26th.

Q. This would indicate on the same date you wrote Mr. Conner you wrote to Mr. Hamilton in San Francisco, asking him to please——

A. Is it going to be admitted first?

Q. I think that might be desirable.

(Defendant's Exhibit L marked for identification.)

Q. (By Mr. McCarty): This L for identification is an accurate copy of a memo you wrote to Mr. Hamilton in San Francisco November 26th, 1956? A. It is.

Mr. McCarty: We offer it into evidence.

(Defendants' Exhibit L marked in evidence.)

(Testimony of Robert E. Driscoll, Jr.)

DEFENDANTS' EXHIBIT L

Homestake Mining Company
Correspondence—Inter-Office

To: John W. Hamilton
From: Kellar & Kellar & Driscoll
Date: November 26, 1956

Dear John:

I am enclosing letter from Conner and Jones regarding the Greenway Albert matter which is self-explanatory. Also see copy of my reply to him which is also enclosed.

Perhaps if you could tell me how you made your computations and check with Mr. Joralemon or Paul as to the $4,000 matter, we can answer him again.

Best regards.

Very truly yours,

.....

RED:d

Admitted in evidence February 21, 1958.

Q. (By Mr. McCarty): I would assume that was followed by other correspondence between you and San Francisco as to how the computation was made? A. Yes.

Q. Mr. Joralemon has told us, Mr. Driscoll, as

(Testimony of Robert E. Driscoll, Jr.)

far as the proposition of deciding what moneys were due under the contract, that was placed in your hands, right?

A. At least partially. It was cleared through our accounting department of course. [83]

Q. This provision that is in this contract that is in evidence, that is the main contract between the people, and seeking to trace back this original provision in the contract, to orient you on the thing, I think you will remember the contract recited that there were certain title defects and that they would be cleared and that Mr. Joralemon would pay the legal expense. And then this language which appears on the third page: "Any legal expense incident to the foregoing paid by lessee shall be deducted from future payments to lessors prorated over one year's payments as they become due." Keep that before you, that specific language.

As you can see, Mr. Driscoll, that language is almost identical to your handwritten language contained in this adjusted memorandum which you wrote out in your own hand back April 28th.

Mr. Bilby: Your Honor, don't these agreements speak for themselves?

The Court: I take it this is preliminary.

Mr. McCarty: It is.

The Court: For that purpose it may go in.

A. Approximately the same.

Q. (By Mr. McCarty): Almost identical, isn't it? A. Yes.

Q. Now, Mr. Driscoll, just assuming for the

(Testimony of Robert E. Driscoll, Jr.)

purposes of argument that you were entitled to some sort of a deduction [84] because of the payment of that $4,000 in settlement of the lawsuit—I am assuming that for the purposes of the question I am about to ask you. Assuming that to be the fact, the amount which was mailed to Mr. Albert out of your San Francisco office November 6th, which has already been stated to the Court, you will recall, was improper, it was not right, right?

A. Yes, sir.

Q. It was improperly computed under the language of that contract which you in your own hand prepared?

A. Under my interpretation of how it should have been computed it was improper, correct.

Q. Accordingly I have little or no doubt that you so advised San Francisco which caused them to issue their second draft, which was dated the 31st of December?

A. Yes, I believe that was the date.

Q. And it was your advice to San Francisco no doubt that occasioned this letter of December 4—January 4, 1957, which is in evidence. Have you seen that letter? A. Yes.

Q. Still trying to decide what became of this memo of yours of September 13th. You recall, at least I have avowed to you, and I am going to prove Mr. Joralemon was in town September 11th and talked to Mr. Albert about the deal. And do you recall a telephone conversation with Mr. Conner the [85] date of September 12th, which would be

(Testimony of Robert E. Driscoll, Jr.)
the day before you mailed those enclosures to San Francisco, do you remember Mr. Conner calling you on that date?

A. I don't know. I am trying to remember and I may be misinformed because this is going pretty much on what I was told, that that final executed draft was typed up down here and signed down here when all the parties were here. That is my understanding. If I am in error on that I will have to double check.

Q. There is no way at all the documents would be marked so you could see whether or not they ever came out of your office?

A. We have typewriters going—it might have, I just don't know.

Q. There is one page in the agreement that seems to have been typed separately and put in. You notice that page 6, it appears to be substantially different? A. And initialed.

Mr. McCarty: I haven't any further questions.

Redirect Examination

By Mr. Dolph:

Q. Mr. Driscoll, Mr. McCarty asked you your understanding or opinion with regard to certain things connected with this contract and I believe you stated on cross-examination that [86] you never had any doubt that Mr. Joralemon, under the terms of this lease, had to pay that first quarterly payment?

Mr. McCarty: I am sorry, but if I asked that

(Testimony of Robert E. Driscoll, Jr.)

I didn't intend to. I asked any demand, whether that was Mr. Joralemon's intention.

The Court: I think that was the question to which I sustained an objection.

Mr. McCarty: I believe you did.

Mr. Dolph: He went into it, your Honor.

The Court: You did get from him he had no doubt that wasn't required under that contract.

Mr. Dolph: What I was trying to elicit was the fact that that was his instructions in the matter and accurately reflected the intention of his principal, to the best of his knowledge.

The Court: Let's hear it further.

Mr. Dolph: All right.

Q. (By Mr. Dolph): Was it your understanding that your principal had any intention that that provision should mean that no notice of termination could be effective before the legally correct amount had been paid on the quarterly payment?

A. Absolutely.

Mr. McCarty: Just a moment. I object to the leading nature of the question. [87]

Mr. Dolph: Your Honor, he went into this and the only way I can ask the question is to define what I am talking about.

The Court: That is leading, Mr. Dolph.

Q. (By Mr. Dolph): I will ask you this. Would you explain to the Court then, Mr. Driscoll, what your instructions and what your understanding of your principal's intention was in agreeing to that provision?

(Testimony of Robert E. Driscoll, Jr.)

A. Yes. It was a compromise to eliminate this ninety day cancellation clause, but clearly not a condition precedent to termination of this agreement.

Q. And what was your understanding with regard to the provision in that paragraph regarding quitclaim deeds? A. The same answer.

Q. You have testified you received Mr. Conner's letter or at least a copy of it, the one dated April 16th, Exhibit 7 in evidence, I hand it to you. I will ask you to tell the Court what you did in connection with this matter after you received notice of that letter?

A. Well, Mr. Joralemon sent me a copy of this letter, Mr. Conner did not, as I recall. And when I got it I immediately felt that there was only one thing to do and that was engage local counsel down here and find out what it was all about, which we did. I came down here and as you gentlemen recall, we discussed it and felt declaratory [88] judgment action was the only thing to find out.

Q. As far as you know, did Mr. Conner receive a response to that letter through your local counsel?

A. My recollection is that you gentlemen went down to see him within a matter of hours or days at the most.

Q. When you said on cross-examination that you did not reply to that letter, you meant that you personally made no written reply to it?

A. That is right.

Mr. Dolph: That is all.

(Testimony of Robert E. Driscoll, Jr.)

Recross-Examination

By Mr. McCarty:

Q. When did you come down and talk to counsel about it? The suit was filed about a month and a half later. When did you come down here?

A. I think I talked to you on the phone first, then I went to San Francisco and had a talk with Mr. Joralemon and got the files out there and on my way back stopped by here and went over it in detail with them. The exact date, let me see. Is that date important?

A. In view of the fact that there was no answer to Mr. Conner's letter until he mailed another one on May 16th to Mr. Joralemon I was sort of curious about the testimony with respect to what we did immediately. [89]

A. It looks to me like it was early in May, because shortly thereafter I was floating around a lot of quitclaim deeds and things.

Mr. McCarty: That is all I have.

The Witness: That is as close as I can come, Mr. McCarty.

Mr. McCarty: All right, thank you.

Mr. Dolph: I have no further questions.

(Witness excused.)

H. GREENWAY ALBERT

called as a witness herein, having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Dolph:

Q. Will you state your name, please?

A. H. Greenway Albert.

Q. You have heard the testimony of these witnesses who have gone before, Mr. Albert, haven't you?

A. Yes, most of it.

Q. And you are one of defendants in this action?

A. That is correct.

Q. I hand you Plaintiff's Exhibits 1, 2 and 3 in evidence and ask you whether those were all signed by you [90] and your wife?

A. They were.

Q. I hand you 4 in evidence and ask you if you received that, and if so when? A. I did.

Q. It is dated November 5th, 1956.

A. I don't know whether it was air mail or not, but probably got it the 6th or 7th.

Q. When you received that what did you do in connection with this lease and option?

A. I didn't do anything right away until I got the——

Q. I think you have to speak a little louder, Mr. Albert, I don't think the Judge can hear you.

A. I don't think I did anything immediately after that. I called Mr. Joralemon up a little later. I think it was another letter, he send me some logs.

(Testimony of H. Greenway Albert.)

Q. About when was it you called Mr. Joralemon? A. I think about the 12th.

Q. Just a few days after you received this letter from him dated November 5th? A. Yes.

Q. What did you say to him over the telephone?

A. I told him that I had gotten a check and it was for the wrong amount. He said I would get a check for $7,000 or something—it was short. And I also asked him if he had [91] sent me the logs on the holes.

Q. Asked him if he had sent you the logs?

A. Asked him if he would send me the logs.

Q. Did you tell him that you wanted any quitclaim deeds or releases on those claims?

A. I did not.

Q. Sir? A. I did not.

Q. Did you tell him that you or your attorneys took the position that until you received such quitclaim deeds or releases that you considered the notice of termination of no effect?

A. No, I didn't.

Q. Did you tell him that either you or your attorney considered that until he had paid you what you claimed was due on the quarterly payment that his notice of a termination had no effect?

A. No.

Q. Did he tell you during that conversation that he was moving out or had moved out of the property?

A. No, I don't think he said anything about that. It is in the letter there.

(Testimony of H. Greenway Albert.)

Q. You deny he told you he was moving out of the property or had moved out?

A. I don't remember about that. I had the letter there [92] saying they were through.

Q. He did tell you though he had to give the property up, didn't he?

A. I don't know whether he told me that over the phone; he told me that in the letter and I told him the amount of the check was wrong. And he said he would take it up with his attorneys, he had nothing to do with that. I said, well, I would get my attorney to take it up with his attorney.

Q. Didn't he tell you they were leaving the property in that telephone conversation?

A. I don't remember that.

Q. You remember your deposition was taken, don't you, Mr. Albert? A. Yes.

Q. On October 1st in our office, 1957, you remember that?

A. Yes, I remember you took the deposition.

Q. Page 26, line 24, were you asked this question and did you give this answer:

"Question: He told you they were leaving, they were getting out of the property, didn't he?

"Answer: Yes."

Did you give that answer?

Mr. McCarty: No, he didn't give that answer. Read the whole answer.

Mr. Dolph: I will go ahead. [93]

Q. (By Mr. Dolph): Continuing: "But when I

(Testimony of H. Greenway Albert.)

talked on further he said he didn't know they were drilling next door.''

Did you give that answer?

A. Yes, I asked Mr. Joralemon if he knew they were drilling on the Bluestone; he said no, he didn't.

Q. But you gave the answer I just read, didn't you? A. If I said so at that time.

Q. Then he did tell you on the phone he was leaving the property, didn't he?

A. I can't remember he said he was leaving the property. I know he wrote that in a letter.

Q. You knew he was getting out of the property and intended to, didn't you?

A. I thought he intended to——

Q. That is all. You have answered my question. After you got this letter from Mr. Joralemon dated November 5th you discussed the question of that letter with Mr. Conner, didn't you, your attorney?

A. Yes.

Q. Didn't he tell you that you had a right to demand quitclaim deeds if you wanted them?

Mr. McCarty: I object to that unless a foundation is laid. When did he talk to him?

Mr. Dolph: I asked him after he had received this letter. [94]

Mr. McCarty: That takes care of us up to this date. I object, no foundation has been laid.

The Court: Lay the foundation, Mr. Dolph.

Q. (By Mr. Dolph): I will ask you whether shortly after you had received this letter, between

(Testimony of H. Greenway Albert.)

the time you had received that letter and the end of 1956, did you have any discussion with Mr. Conner concerning the letter?

A. I don't remember the date.

Q. Maybe you can fix the time then. Did you ever have any discussion with him concerning the letter? A. Yes, later on.

Q. When?

A. I don't remember just the date.

Q. Don't you remember the month?

A. Probably in February, I imagine.

Q. February of what, 1957?

A. That is right.

Q. You mean you didn't discuss it with Mr. Conner before February, 1957, you didn't discuss this letter with him?

A. I may have discussed it with him. I can't remember.

Q. But you don't remember. Didn't you go in right after you got the checks in November?

A. I did. I went over——

Q. About what time in November was that, what period in November was that? [95]

A. I think around the 12th or some place.

Q. What?

A. I think around the 10th or 12th.

Q. Did you discuss this letter dated November 5th at that time?

A. I think I mentioned I had gotten a letter. I think maybe I showed it to Mr. Conner.

(Testimony of H. Greenway Albert.)

Q. Did you discuss quitclaim deeds with him at that time?

A. I asked him if my lease was still good, whether the lease was cancelled; he said, "Did you get your quitclaim deed?" And I said no. I also hadn't gotten the full amount of my quarterly payment that was due on November 8th.

Q. Did he tell you at that time that you had a right to demand a quitclaim deed?

A. No, not at that time. I think it was in February he did, because I took it up with him then.

Q. He told you in February you had a right to demand the quitclaim deed?

A. I had some people out here interested in the property and he said I couldn't do any business with them because my lease was still in effect and until I got the quitclaim deed back, which I hadn't got. He said, "Did you get it?" And I said, "No, I haven't gotten any payments." The quarterly payment hadn't been settled yet. [96]

Q. Then it wasn't at the time you took your check in to him that he told you that you could demand the quitclaim deed?

A. No, that was discussed later.

Q. Going back to your deposition, page 30, line 14, were you asked these questions and did you give these answers:

"Question: When you took those checks in to Mr. Conner didn't you discuss anything about the quitclaim deeds or relationship of the property?

(Testimony of H. Greenway Albert.)

"Answer: Yes, I told him I hadn't got the quitclaim deeds.

"Question: What did he say?

"Answer: He said the lease was still in effect until I got the quitclaim deed.

"Question: What did he tell you to do about it?

"Answer: He said there wasn't anything I could do unless I wanted my property back, he could write and demand the quitclaim deed."

Did you give those answers to those questions?

A. That is correct.

Q. Then you did discuss it with him at the time you went in with those checks?

A. I don't know just when it was I discussed it, I don't know the date.

Q. This deposition was taken back in October of last year. Would your recollection have been a little better [97] then than it is now?

A. It probably would be, yes.

Q. And you told him at that time not to demand a quitclaim deed, didn't you? A. I did.

Q. Your answer?

A. Yes, I told him I didn't want to demand a quitclaim deed.

Q. In that conversation you had with Mr. Joralemon a few days after you received this letter, you didn't tell him anything about trying to hold him to the lease because you didn't have the correct amount or the quitclaim deed, did you?

A. No.

Q. At that time you requested he furnish you

(Testimony of H. Greenway Albert.)

the log data from the drill holes he had made, right? A. That is correct.

Q. I hand you Exhibit 5 in evidence and ask you if you received that from Mr. Joralemon in response to your request? A. I did.

Q. After receiving Exhibit 5 in evidence did you get in touch with Mr. Joralemon and tell him you were taking the position that he was still on the lease and option and that rentals were accruing?

A. No. [98]

Q. Did you ever tell him that? A. No.

Q. You did have your attorney, Mr. Conner, write to Mr. Driscoll on a letter dated November 21st, which is Plaintiff's Exhibit 6 in evidence, didn't you? A. Yes, that is correct.

Q. You told him what to tell him?

A. Yes. I told him I hadn't gotten the full amount, the quarterly payment.

Q. Did you tell him to advise Mr. Driscoll you were taking the position there was no termination until this matter of the quarterly payment was straightened up?

A. No, that wasn't mentioned.

Q. How long have you known Mr. Joralemon?

A. Since March, 1911, I think.

Q. And he is a personal friend as well as a business acquaintance, right?

A. That is correct.

Q. And you feel you could trust him to take care of anything that would be necessary for your protection?

(Testimony of H. Greenway Albert.)

A. Ordinarily, but Mr. Joralemon said that the attorneys were taking care of it, so I got my attorney to get in touch with Mr. Driscoll and I didn't bother Mr. Joralemon any more. That was the last conversation we had.

Q. You and Mr. Joralemon by this time, after all these [99] years of friendship, had a feeling between you which made you feel as if he wouldn't take any unfair advantage of you by a technicality, didn't you?

Mr. McCarty: I don't see any propriety at all to any such question as that.

The Court: I don't see it, Mr. Dolph.

Q. (By Mr. Dolph): You never had any doubt in your mind if you had requested Mr. Joralemon to do so, he would furnish you with a quitclaim deed, did you?

A. I don't know what Mr. Joralemon would have done.

Mr. McCarty: I didn't hear that answer.

The Witness: I would assume they were holding the lease until they found out what they got in the deep holes they were drilling next to me at the Bluestone.

Q. (By Mr. Dolph): Mr. Albert, you had discussed this particular property with Mr. Joralemon many times over the period of years, haven't you?

A. Oh, yes; Mr. Joralemon had an option on it at one time.

Q. He was familiar with the property and you were familiar with it, right?

(Testimony of H. Greenway Albert.)

A. I don't know whether he was familiar with the conditions, recent conditions: he was familiar with it many years ago.

Q. But you had stated to him your theory about where the [100] ore would be if there was any, hadn't you?

A. Well, I think maybe I did, yes.

Q. You know you did, don't you?

Mr. McCarty: Just a moment. What conceivable materiality does this have?

Mr. Dolph: I believe it is preliminary, your Honor. I am entitled to go into it to show Mr. Albert knew what was going on.

The Court: I take it you are getting at estoppel now, Mr. Dolph?

Mr. Dolph: Yes, your Honor. Well, not only estoppel, but I think if you will read the last, the next to the last sentence in this letter.

Mr. McCarty: What letter is the Court reading now?

The Court: 5 in evidence. On estoppel, Mr. Dolph, what this man might by his conduct, or what he said or what he did would have led Mr. Joralemon to do or not to do, or believe or not believe, that would bear on that, but as to what this man thought——

Mr. Dolph: What he thought has a bearing on what his knowledge and understanding was as to the intentions of the other party.

The Court: Well, Mr. Joralemon's letters express that. They are already in evidence, his letter,

(Testimony of H. Greenway Albert.)

Exhibit 4, in addition to Exhibit 5. This goes way back, as I understand [101] it. Let me have the question again, Mr. Baker.

(The previous three questions and answers were read.)

The Court: I will sustain the objection. I don't see where it would have any bearing on this.

Q. (By Mr. Dolph): Mr. Albert, did you at any time, either personally or through agent or attorney, state expressly or indicate in any way to Mr. Joralemon or any of his agents, prior to Mr. Conner's letter dated April 16th of 1957, which is Exhibit 7 in evidence, did you ever before that time ever make any such indication that you took the position that this lease and option could not be terminated except after all payments had been made on that quarterly payment and after a quitclaim deed had been executed and delivered to you?

A. You say before this?

Q. Yes, sir. A. No.

Q. Prior to that time did you or anybody on your behalf ever request or demand a release or quitclaim deed on this property? A. No.

Mr. Dolph: No further questions.

Examination

By Mr. McCarty:

Q. Mr. Albert, I believe you said you talked to Mr. [102] Joralemon shortly after you got his letter of November 5th, right? A. Yes.

(Testimony of H. Greenway Albert.)

Q. Now here in evidence, Mr. Albert, is Plaintiff's Exhibit 5, which is a letter to you from Mr. Joralemon, dated November 16th?

A. That is right.

Q. It refers to a telephone conversation of that morning? A. That is right.

Q. Could that have been the day you had that conversation? A. Yes.

Q. Do you actually remember the date at this time?

A. I am not sure of it. It was approximately that.

Q. You told Mr. Dolph that in that conversation you discussed with Mr. Joralemon the fact that you weren't happy with the payment?

A. I did.

Q. And he said that he was leaving that up to the lawyers? A. That's right.

Q. I think you said so accordingly after that conversation you went to talk to your lawyer?

A. He said that the——

Q. Answer my question.

Mr. Dolph: I object to the question on the ground it is leading and also calls for testimony that is already in. [103] The record speaks for itself.

Q. (By Mr. McCarty): Was it before or after your conversation with Mr. Joralemon on the phone that you went and consulted with Mr. Conner about the money? A. That is correct.

(Testimony of H. Greenway Albert.)

Q. Which was it, before or after?

A. After.

Mr. McCarty: That is all the questions I have at this time.

Mr. Dolph: No further questions.

Mr. McCarty: I will stipulate the actual settlement of the thing was consummated by telephone August 17, because that is the date Homestake actually sent its money. As far as the formalities of the thing are concerned, the papers were mailed to Salt Lake City to be placed in escrow August 3rd. I have the letter of transmittal. It is entirely likely and I will submit, so far as the final settlement of the thing, that wasn't brought about until early September, 1956.

Mr. Dolph: We are referring now to the quiet title action against Uranium Company of America, your Honor. With the stipulation, we rest.

(Plaintiff rests.)

Mr. McCarty: Your Honor, if we could take a short recess. [104]

The Court: We will take a ten minute recess.

(Recess.)

After recess:

Mr. McCarty: I think counsel will join me in a stipulation, your Honor, that payments made on behalf of the plaintiff to the defendants were made

in the following amounts and on the following dates: The sum of $2,000 was paid prior to September 20th, 1956; on September 20, 1956, $1,000. On October 7, 1956, $1,000. On November 6th, 1956, $1,000. I think counsel will join me in a stipulation that all of those payments were made as $1,000 a month provisions under the terms of the contract. Further, a payment was made November 6th, 1956, in the amount of $3,932.15. A payment was made December 31, 1956, in the amount of $1,286.52. In all cases the dates above mentioned are the dates appearing on the vouchers themselves. They don't purport to be the date of transmittal, as for instance, the last payment which was actually transmitted around the 4th or 5th of January. I will ask that counsel stipulate the vouchers may be admitted in evidence. They are all here except the voucher for the second payment, I don't know where it is.

Mr. Dolph: We have no objection to the vouchers, but as for your stipulation, I think you have made a slight error inadvertently. I think the first $2,000 was paid under [105] paragraph 8-a of the contract.

Mr. McCarty: It had been theretofore paid?

Mr. Dolph: Yes. And the further $1,000 payments were made under paragraph 8-b. That is the $1,000 a month payment.

Mr. McCarty: I will accept that amendment.

Mr. Dolph: We will stipulate to the balance of your statement.

Mr. McCarty: May the vouchers be received in evidence as one exhibit?

Mr. Dolph: We have no objection.

The Court: It may be received as "M" in evidence.

(Defendants' Exhibit M marked in evidence.)

Mr. McCarty: Mr. Albert, will you take the stand again, please?

H. GREENWAY ALBERT

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

By Mr. McCarty:

Q. Mr. Albert, I have already discussed with you Mr. Joralemon's letter of December 16th referring to your telephone conversation with him. There is now in evidence Mr. Conner's letter of November 21, 1956, to Mr. Driscoll, [106] discussing the discrepancy in the amount forwarded?

A. That is correct.

Q. Was it between those two dates you talked to Mr. Conner? A. Yes.

Q. Now, had you talked to Mr. Conner at any time prior to that conversation and after you had received Mr. Joralemon's letter indicating his intention to surrender?

A. I think not. I don't recall it.

Q. What did you do with that draft, Mr. Albert, which was for some 3900 odd dollars, what did you actually do with that draft?

(Testimony of H. Greenway Albert.)

A. I took it over to Mr. Conner and left it with him. I told him the amount was incorrect; I didn't want to cash it.

Q. Do you recall when was the next time you saw Mr. Conner?

A. I think it was early in January.

Q. Did you receive that check——

A. 1200 and something.

Q. ——$1286.52. What did you do with that?

A. I took it over and gave it to Mr. Conner, told him the amount was still insufficient.

Q. Have those drafts since been negotiated by you? A. Yes.

Q. When did you negotiate them? [107]

A. After they filed suit against me I asked you if it was all right to deposit those checks.

Q. And I told you it was?

A. You told me it was.

Q. And you did?

A. I did. You said I had better wait until I put them in for collection.

Q. After that date early in January when you took that second draft up to Mr. Conner, will you tell the Court about when you next discussed the matter with Mr. Conner?

A. I think it was around February, I think it was.

Q. And at that time did you have any discussion with Mr. Conner with respect to legal position under this contract?

(Testimony of H. Greenway Albert.)

Mr. Bilby: I object to this as being immaterial, if the Court please.

Mr. McCarty: They seem to be greatly concerned over his state of mind.

The Court: I think he was examined about his conversation there in February, 1957, about the time he went to see Mr. Conner.

Mr. McCarty: Yes, sir, he was.

Mr. Dolph: He was examined about an earlier time he went to see Mr. Conner, if the Court please.

Mr. Bilby: He said he went in February but he was not examined about that, your Honor. He was examined about the [108] time he said he took the checks.

The Court: He testified in February he wanted, or had somebody express some interest in the property and he went to Mr. Conner and talked to him about whether he could let them have it and Mr. Conner said no because the lease was still in effect.

Mr. McCarty: I will withdraw the question.

Q. (By Mr. McCarty): Do you recall when it was you next went to see Mr. Conner about it?

A. I think the 15th of April.

Q. That was the day before Mr. Conner's letter to Mr. Joralemon, right? A. That is true.

Q. Do you now remember how many times altogether you talked to Mr. Conner about this?

A. No, but quite a number of times. I did some telephoning, too.

Mr. McCarty: That is all the questions I have.

Mr. Dolph: No questions.

IRA JORALEMON

recalled as a witness, having been previously sworn, testified as follows: [109]

Cross-Examination

By Mr. McCarty:

(Defendants' Exhibit N marked for identification.)

DEFENDANTS' EXHIBIT N

[Letterhead of Pioneer Hotel, Tucson, Ariz.]

Sept. 11, 1956.

Mr. Charles E. Conner,
Tucson.

Dear Mr. Conner:

I enclose herewith the Driscoll draft of the proposed final contract between Greenway Albert and myself that you handed me this afternoon, and also a later draft that includes the changes agreed on with Greenway Albert after we left you.

These may be useful in your telephone talk with Driscoll tomorrow.

Yours sincerely,

/s/ IRA B. JORALEMON.

Marked for Identification February 21, 1958.

(Testimony of Ira Joralemon.)

Q. (By Mr. McCarty): Mr. Joralemon, so that you won't have to rely on your memory at all, I want you to examine N for identification and tell me whether or not you were in Tucson, Arizona, September 11, 1956? A. Yes.

Q. That letter is a letter which you actually wrote in Tucson that day? A. That is true.

Q. Prior to the writing of that letter on that date you had been in conference with Mr. Albert on this deal? A. I had been.

Q. I notice in the letter that you returned a draft of a contract to Mr. Conner so that he would have the benefit of it in a telephone call which you anticipated he would make to Mr. Driscoll the next day? A. That was evidently it.

Q. All right, sir. I want you to look at this J for identification, Mr. Joralemon, the handwriting appearing at the top of the first page of that is your handwriting? A. That is my handwriting.

Q. This is in truth and in fact the very draft you discussed with Mr. Albert in Tucson, [110] Arizona?

A. I think it must have been. I am not sure but what I may have marked two copies, but this is the version of the contract I discussed with Albert. It may be one of two I discussed with him.

Q. I notice at the top these words appear: "Draft discussed by JGA and IVJ, September 11, 1956". A. Yes.

Q. That is written in your handwriting?

A. Yes. My recollection is I had two copies of

(Testimony of Ira Joralemon.)

this and made the later comments on each copy, so there were two of them discussed with Albert at the same time.

Q. Where did you get the drafts from?

A. Brought them from San Francisco and they had resulted in several earlier drafts prepared, some by Mr. Driscoll, some by Mr. Taylor, some a combination of them. They were the result of quite a lot of discussion.

Q. You brought these from San Francisco?

A. I brought them from San Francisco.

Q. On page 2 on the margin of the page there is some handwriting. That is also your handwriting? A. That is my handwriting.

Q. And these words which pick up after the provisions of the contract with respect to the surrender of the lease, there is handwritten——

Mr. Dolph: If the Court please, we object to this on [111] the ground the instrument is not in evidence and the question is immaterial.

Mr. McCarty: I will offer the instrument in evidence.

Mr. Dolph: We object to it upon the ground it is immaterial.

The Court: May I see it?

Mr. Dolph: The parol evidence rule prohibits going into all these things.

Mr. McCarty: I understand the Court held there was an ambiguity with respect to that provision.

Mr. Dolph: We don't dispute there is an ambiguity.

(Testimony of Ira Joralemon.)

The Court: May I see 3. I don't know that this would be of any help, Mr. McCarty. You are referring to the matter in paragraph three?

Mr. McCarty: I am indicating with some vividness Mr. Driscoll's answer to Mr. Dolph's leading as to whether or not they had intended that payment to be a condition precedent and there it is in the handwriting of the parties. The Court has ruled he conceived there to be an ambiguity in connection with 3 in comparison to 13.

The Court: The part that was ambiguous to me is not aided by what I see right now. I am going to receive it and I will consider it only for that purpose, if it throws any light on what I feel at this time is an ambiguity between 3 and 13, I will consider it, otherwise it will be disregarded. [112]

Mr. McCarty: It might greatly shorten this procedure, I understand probably the Court's feeling with respect to ambiguity is directed to the necessity of a deed, is that the Court's feeling about an ambiguity?

The Court: Yes. Whether it was necessary under the provisions of the contract for the lessee or optionee to give the deed in order to terminate the contract or whether the notice would terminate it subject to the right of Mr. Albert to demand the deed.

Mr. Bilby: Whether the deed had to accompany the notice.

The Court: No, whether a deed was necessary to make the termination or the notice effective,

(Testimony of Ira Joralemon.)

whether accompanying it or any other time. To me I see a little difference in the wording, but I am still of the opinion there is an ambiguity there. I will consider it for that purpose. That is J.

(Defendants' Exhibit J marked in evidence.)

Mr. McCarty: I have no further questions.

Mr. Dolph: No further questions.

Mr. McCarty: The defendants rest, your Honor.

(Defendants rest.)

Mr. Dolph: Have all our exhibits been admitted?

The Clerk: Yes.

Mr. Dolph: We have nothing further and we rest. [113]

Mr. McCarty: May I ask if all the exhibits I have have been marked, save and except the last one?

The Clerk: "F" was not admitted.

Mr. McCarty: I don't need that admitted. And the last one I had marked was not admitted.

The Court: I don't show "H" admitted.

Mr. McCarty: I ask that that be admitted. That is a letter in which Mr. Driscoll transmitted to Mr. Conner drafts.

Mr. Dolph: We object to it on the ground it is not material.

The Court: May I see it? It may be received.

(Defendants' Exhibit H marked in evidence.)

DEFENDANTS' EXHIBIT H

August 25, 1956.

Mr. Charles Conner,
Box 310,
Tucson, Arizona.

Dear Mr. Conner:

Herewith copy of proposed agreement between Albert and Joralemon. I would appreciate your comments on it as soon as possible.

It is becoming more important that we definitely ascertain whether any of these claims are located on state land and not a part of the unappropriated public domain subject to mineral entry.

I would also appreciate hearing from you as to how our settlement is progressing.

Very truly yours,

R. E. DRISCOLL, JR.

RED:d

Marked for Identification February 21, 1958.

Mr. McCarty: We are prepared to argue the matter with authorities at this time, if your Honor wants to hear argument.

Mr. Dolph: We can do so also, but I believe the time could be used to better avail if the Court

gave us a chance to look over this voluminous set of exhibits.

The Court: I will tell you what I prefer, I prefer counsel to give me a memoranda without the motion, just limit it strictly to your views as to what all the evidence, including the exhibits, amounts to, and your position on the legal points.

Mr. Bilby: A brief memorandum? [114]

The Court: Yes. I don't care anything about any discussion of the habits, character or anything else of any of the parties; just exactly what the evidence amounts to and the legal points that are involved in it. I think all counsel know what I have in mind on it. How much time do you need for that?

Mr. McCarty: You want us to file them simultaneously?

The Court: Simultaneously.

Mr. Dolph: I think probably a couple of weeks, your Honor.

Mr. McCarty: I have my brief ready except for typing it so any time at all, if the Court please.

The Court: Do you want two weeks, Mr. Dolph?

Mr. Dolph: I will try to get it in earlier than that, but you never know what might come up.

Mr. McCarty: If you want more, ask for it.

Mr. Dolph: Let's ask for ten days.

The Court: I would rather give you what time you need. You know your situation.

Mr. Dolph: If we may, I would like two weeks then.

The Court: The matter will be submitted on

memoranda to be filed by each side within fifteen days of this date, the memoranda to be filed simultaneously. When the memoranda are filed the matter will stand submitted. [115]

State of Arizona,
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I am an Official Court Reporter in the United States District Court, District of Arizona, and that as such Official Court Reporter, I attended the hearing in the foregoing-entitled cause; that I took down in shorthand all the oral testimony adduced and proceedings had; that such shorthand was reduced to writing under my supervision and the foregoing 116 pages of typewritten matter contain a full, true and correct transcript of my shorthand notes taken by me as aforesaid.

Witness My Hand this 24th day of September, 1958.

/s/ FRED L. BAKER,
Official Court Reporter.

[Endorsed]: Filed September 25, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of the said Court, including the records in the case of Ira B. Joralemon, Plaintiff, versus H. Greenway Albert and Maja Greenway Albert, husband and wife, Defendants, numbered Civil-964 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the City of Tucson, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated in the Appellants' Amended Designation and Designation by Appellee of Additional Matters to be Included in Record filed therein and made a part of the record attached hereto and the same are as follows, to wit:

1. Plaintiff's Complaint and all exhibits attached thereto.

2. Defendants' Answer and Counterclaim.

3. Plaintiff's Reply to Counterclaim.

4. Minute entry of October 4, 1957.

5. Defendants' Amended Counterclaim.

6. Plaintiff's Reply to Amended Counterclaim.

7. Minute entry of February 21, 1958 (proceedings of trial).

8. Plaintiff's original exhibits Nos. 1 to 10, inclusive, and Defendants' original exhibits A to E, inclusive, and G to M, inclusive, admitted, and Defendants' exhibits F and N marked for identification.

9. Minute entry of March 25, 1958 (opinion of the trial court).

10. Minute entry of May 5, 1958.

11. Minute entry of June 10, 1958.

12. Findings of Fact and Conclusions of Law Proposed by Plaintiff.

13. Defendants' proposed Findings of Fact and Conclusions of Law.

14. Plaintiff's Objections to Findings of Fact and Conclusions of Law Proposed by Defendants.

15. Findings of Fact and Conclusions of Law.

16. Judgment.

17. Notice of Appeal.

18. Bond on Appeal.

19. Appellants' Designation of Record.

20. Reporter's Transcript of Proceedings filed September 25, 1958.

21. Appellants' Amended Designation of Record.

22. Statement of Points on which Defendants-Appellants Intend to Rely.

23. Designation by Appellee of Additional Matters to be Included in Record.

24. Reporter's Transcript of Pretrial hearing had October 4, 1957, filed on October 13, 1958.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of $4.40 and that sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court at Tucson, Arizona, this 13th day of October, 1958.

WM. H. LOVELESS,
Clerk.

[Seal] By /s/ ERMELIA COLE,
Deputy Clerk.

[Endorsed]: No. 16222. United States Court of Appeals for the Ninth Circuit. H. Greenway Albert and Maja Greenway Albert, Appellants, vs. Ira B. Joralemon, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed and Docketed: October 15, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 16222

H. GREENWAY ALBERT, et ux.,
Appellants,

vs.

IRA B. JORALEMON,
Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY

Appellants in their appeal from the final Judgment entered in this action by the District Court of the United States for the District of Arizona on the 18th day of June, 1958, intend to rely on the following points:

1. The District Court's Findings of Fact and Conclusions of Law upon which said Judgment was based, insofar as set forth in Exhibit "A" which is attached hereto and by this reference made a part hereof, are not supported by the evidence.

2. The District Court erred in reaching Conclusion of Law V, set forth in Exhibit "A," for the reason that there was no allegation of waiver in the pleadings.

Respectfully submitted,

GATEWOOD & GREENWAY,

By /s/ THOMAS J. TORNEY,
Attorneys for Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 25, 1958.